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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

FRANK ADAMO, as Executor of the Estate of Norma Rose, and LEONARD ROSE,

Petitioners,

—v.—

BROWN & WILLIAMSON TOBACCO CORPORATION, as successor in interest to THE AMERICAN TOBACCO COMPANY, PHILIP MORRIS USA INC., and R.J. REYNOLDS TOBACCO COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the New York Court of Appeals denied petitioners' due process under the Fourteenth Amendment by creating a new rule of law (requiring an additional element of proof in a negligent cigarette design case) after a jury verdict in favor of petitioners' and then retroactively applied it to dismiss petitioners' action, where petitioners' justifiably relied upon New York State product liability law that existed at the time of trial.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Frank Adamo, as Executor of the Estate of Norma Rose, and Leonard Rose, respectfully petition the Court for a writ of certiorari to review the judgment of the New York Court of Appeals in this case rendered December 16, 2008 and the denial of the motion to reargue on March 26, 2009.

OPINION BELOW

The opinion of the New York Court of Appeals is reported at 11 N.Y.3d 545 and reprinted in the Appendix at pages 1a-6a. The Court of Appeals denial of the motion to reargue is reprinted in the Appendix at page 7a. The opinion of the Supreme Court of the State of New York, First Appellate Department is reported at 53 A.D.3d 80 (1st Dept. 2008) and reprinted in the Appendix at pages 8a-53a. The opinion of the Supreme Court of the State of New York affirming the verdict is reprinted in the Appendix at pages 54a-68a.

JURISDICTION

The New York Court of Appeals entered its judgment on December 16, 2008. A motion to reargue was timely made and denied on March 26, 2009. Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

This case involves a violation of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

This is a products liability action that was brought in the Supreme Court of the State of New York, New York County, against respondent tobacco manufacturers. This case arose when Norma Rose developed lung cancer after smoking respondents' cigarettes for more than 40 years. The action proceeded on the theory that respondents negligently designed their cigarettes by *manipulating* the levels of nicotine to start and sustain addiction. As a direct result of nicotine manipulation, Norma Rose was unable to quit smoking during her first 15 quit attempts. She quit in 1993. Norma Rose died during the pendency of the appeal before the New York Court of Appeals. As a result of her addiction to nicotine, she was subjected to prolonged exposure to cancer producing tar which caused her lung cancer and death.

After eight weeks of trial, the jury determined that respondents were negligent in the design of their product in that it was feasible to manufacture, and did in fact market, safer alternative cigarettes containing a level of nicotine that did not start or sustain addiction. In its decision, the New York Court of Appeals concluded that there was sufficient evidence at the trial from which a jury could find that petitioners' non-addicting safer alternative design cigarettes were in fact safer.

The vacatur of the verdict was based upon the *retroactive application* of a *new* element of proof in New York product liability law—consumer acceptability. The Court of Appeals affirmed the Appellate Division, First Department creation of this *new* element of proof after the jury verdict, then used it retroactively to dismiss the case. This *new* element

of proof, as stated by the New York Court of Appeals, requires that the safer alternatively designed product *must* have the "same utility", be "equivalent in function", be "as acceptable", "function as well" and be "as satisfying" as the defective product. Pet. App. 4a-5a. Petitioners and the trial court, however, *justifiably relied* upon the law that existed at the time of trial, which did *not* require proof of consumer acceptability. The retroactive application of this new rule to defeat petitioners' action is fundamentally unfair and a violation of due process.

II. A NEW RULE OF LAW SHOULD NOT BE APPLIED RETROACTIVELY TO DEFEAT PETITIONERS' ACTION SINCE THERE WAS JUSTIFIABLE RELIANCE ON THE OLD RULE OF LAW

A new rule of law is one which either overrules clear past precedent on which the litigants may have relied or resolves an issue of first impression not clearly foreshadowed by prior precedent *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Under this definition, the concept of consumer acceptability as an element of proof in a New York cigarette negligent design case is a "new rule". There is no precedent in New York tobacco litigation for this concept, and it is one of first impression. As recognized by the Honorable James M. Catterson in the dissent below, this *new* rule represents a dramatic shift away from the established elements in this cause of action.

> Because I believe that *consistent with well-established principles of products liability jurisprudence* the plaintiffs fulfilled their burden of demonstrating that a safer alter-

> native was not only feasible but, in fact, was manufactured, I must respectfully dissent. Evidence adduced at trial sufficiently established that the safer alternative *ultra light* was the same as a regular cigarette in all respects save for its non-addictive levels of nicotine and cancer-causing tar. Thus, I find no legal merit in the defendants' assertion, which the majority supports, that the plaintiffs had an *additional burden* to show consumer acceptability of the non-addictive product. In my view, this is nothing more than a cynical effort by the defendants to maintain the commercial advantages of continuing to sell unreasonably dangerous addictive products to addicts *Rose v. Brown & Williamson Tobacco Corp.*, 53 A.D.3d 80 (1st Dept., 2008) (emphases added).

While the historic common-law rule is that a change in decisional law usually will be applied retrospectively to cases still in the normal litigating process, this rule has been tempered where there was *significant reliance* on the overruled precedent *People v. Pepper*, 53 N.Y.2d 213 (1981). It is now recognized that when adherence to the traditional course is strongly contraindicated by powerful factors, including strong elements of reliance on law superseded by the new pronouncement, a court may direct that it operate prospectively alone *Gager v. White*, 53 N.Y.2d 475, 483 (1981).

Prior to the New York Appellate Division, First Department and New York Court of Appeals decision herein, *no* plaintiff in New York tobacco litigation had to prove that a feasible safer, alternative design would be acceptable to the consumer. Not

only did the New York appellate courts create this new rule of law after the jury verdict without relying upon any precedent, it further determined that this new rule was an *essential* element of proof required to make a prima facie showing in an action for negligent cigarette design.

By creating a new rule of law and applying it retroactively, the New York appellate courts violated well-established principles that courts may only apply new rules of law prospectively when there is significant *reliance* upon the old rule. The retroactive application of the *new* rule deprived petitioners of their right to seek compensation for their injuries, which is a denial of due process.

II. CHANGING THE LAW AFTER THE TRIAL AND APPLYING IT RETROACTIVELY IS A DENIAL OF DUE PROCESS AS IT DEPRIVES PETITIONERS OF THEIR CAUSE OF ACTION

The United States Supreme Court should review this matter as the determination by the New York Court of Appeals has deprived petitioners of their right to bring the action by changing the burden of proof *after* the jury verdict and then dismissed the complaint for failure to meet that new burden, even though it did not exist at the time of trial. This is a significant denial of due process that conflicts with prior determinations that preclude the retroactive application of new law.

A. This Court may consider a violation of due process even if not expressly presented during the initial appeal since it was the appellate courts that created the new rule.

Prior to the determination by the intermediate appellate court, there was no violation of due process since it was that court that created the new rule and the New York Court of Appeals enforced it retroactively. This argument was presented to the New York Court of Appeals in the motion to reargue.

The issue of due process was before the court below and incorporated within the argument that the additional element of consumer acceptability was new and never before a factor in determining whether a tobacco product was designed defectively under New York law. As the facts of the case made issue of the promulgation of a new rule by the appellate courts, after trial, the denial of due process is an issue that could be decided as one fairly included within the question presented below *Caterpillar Inc. v. Lewis*, 519 U.S. 61 (1996).

Petitioners raised the issue of the appellate court imposing a new rule of law that created a heightened burden of proof upon petitioners. Petitioners steadfastly maintained throughout that this new rule created an impossible burden that did not exist during the trial.

Respectfully, petitioners are not limited here to frame the question the same way it was framed below. Having raised the issue below, petitioners are entitled to formulate any argument in support of that claim here *Yee v. City of Escondido, Cal.*, 503 U.S. 519 (1992).

While the general rule is that issues must be raised in lower courts in order to be preserved as potential grounds of decision in higher courts, "this principle does not demand the incantation of particular words; rather, it requires that the lower court be fairly put on notice as to the substance of the issue" *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469-470 (2000).

B. Petitioners were denied due process when a new rule of law was created and applied retroactively to dismiss their claim.

It is well settled that "[F]airness of procedure is due process in the primary sense. It is ingrained in our national traditions and is designed to maintain them" *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 161 (1951).

By imposing a new requirement upon petitioners in this negligent design case after the verdict, and using the failure to introduce evidence to establish this new element, where petitioners never had *notice* of the change in the law or an opportunity to meet that new burden, is a denial of due process.

A person has a common-law right to sue for personal injuries and those rights may not be taken away without due process *Montgomery v. Daniels*, 38 N.Y.2d 41 (1975) [rights of property which have been created by the common law cannot be taken away without due process].

As recognized by this Court, a vested cause of action is property and is protected from arbitrary interference *Gibbes v. Zimmerman*, 290 U.S. 326 (1933); *Pritchard v. Norton*, 106 U.S. 124 (1882), and an aggrieved party is guaranteed by the Fourteenth Amendment the preservation of his substan-

tial right to redress such wrong by some effective procedure *Gibbes v. Zimmerman*, supra.

Respondents may choose to disregard these well-settled principles as being old, but these concepts have withstood the test of time and are as sacred today as when first recognized.

While a state court has the power to change its decisional law when that court overrules a consistent line of decisions with the retroactive effect of denying litigants a hearing in a pending case, it thereby deprives them of due process of law, in its primary sense, of an opportunity to be heard and to pursue their substantive rights *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930); *Bouie v. City of Columbia*, 378 U.S. 347 (1964). A judicial alteration of a common law doctrine violates the principle of fair warning and hence must not be given retroactive effect since it is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue *Rogers v. Tennessee*, 532 U.S. 451 (2001).

As Justice Brandeis concluded in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, supra "Whether acting through its judiciary or through its legislature a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it" *id.* at 682. By changing the law and dismissing petitioners' case based upon the changed law, the New York appellate courts deprived petitioners of their right to redress decedent's injuries. A change in law which denies petitioners the opportunity to present evidence in accord with that changed rule, substantially deprives him of due pro-

cess of law *Slewett & Farber v. Board of Assessors*, 80 A.D.2d 186 (2nd Dept., 1981), quoting *Board of Comers of City of Auburn v. Merchant*, 103 N.Y. 143 at 148 (1886) [to satisfy constitutional due process requirements, a party must receive a fair opportunity to submit all the facts to the jury to be weighed by them and a change in rules midstream depriving a party of that opportunity is a denial of due process].

It seems quite clear not only from *Brinkerhoff* but from simple principles of fundamental fairness that a state cannot retroactively change the rules so as to deny a litigant a forum for his claim *Gonzalez v. Wilmot*, 1986 WL 8854, 7 (S.D.N.Y., 1986).

When a new burden is placed on a party as part of that new law and the party charged with carrying the burden is not permitted an opportunity to go forward with evidence to meet the burden, procedural due process guarantees are violated *Caperton v. A.T. Massey Coal Co., Inc.*, ___ S.E.2d ___, 2008 WL 918444 (W.Va., 2008) (dissenting opinion).

As set forth by this Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the court recognized the doctrine of non-retroactivity in civil cases. See also *American Trucking Assocs., Inc. v. Smith*, 496 U.S. 167 (1990). In *Chevron*, 404 U.S. at 106-7, this Court articulated three separate factors for the court to consider in cases dealing with the non-retroactivity question:

> First, the decision to be applied non-retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see e.g., *Hanover Shoe, Inc. v. United Shoe*

> *Machinery Corp.*, supra, 392 U.S., at 496, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, e.g., *Allen v. State Board of Elections*, supra, 393 U.S., at 572. Second, it has been stressed that 'we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' *Linkletter v. Walker*, supra, 381 U.S., at 629. Finally, we have weighed the inequity imposed by retroactive application, for '(w)here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity.'

Here, the three factors to be considered have been met. Consumer acceptability was a new principle of law and the decision below requiring it as an essential element of proof was one of first impression; there is *no* prior history where consumer acceptability was a required element in New York tobacco litigation; and the dismissal of the complaint post verdict, resulted in a substantial inequitable result.

The new rule of law propounded by the New York appellate courts is a radical departure from established law of products liability that has been used in New York cigarette litigation for more than a decade prior to this case and the retrospective operation of the new rule abrogated petitioners' valuable property right which created an injustice to petitioners.

III. PETITIONERS PROOF OF A SAFER FEASIBLE AND FUNCTIONAL ALTERNATIVE DESIGN SATISFIED THE NEW YORK STANDARD

The core elements of petitioners' negligent cigarette design claim were straightforward and undisputed: (1) respondents failed to exercise reasonable care by designing their cigarettes to start and sustain addiction to a known cancer-causing product, which they then marketed and sold to Norma Rose; and (2) this unreasonably unsafe aspect of the product's design was a substantial factor in causing the petitioners' injuries *Voss v. Black & Decker Mfg. Co.*, 59 N.Y.2d 102, 107 (1983); See *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 385-87 (1976); *Gonzalez v. Delta Int'l Mach. Corp*, 307 A.D.2d 1020, 1021 (2nd Dept., 2003); see also *Rogers v. R.J. Reynolds Tobacco Co.*, 557 N.E.2d 1045, 1053 n.8 (Ind. Ct. App., 1990) ("[A] design defect which renders the product more addictive than it could be or addictive when it need not be at all may render the cigarette unreasonably dangerous in conjunction with its harmful qualities."].

These are factual questions reserved for determination by the jury *Voss v. Black & Decker Mfg*, 59 N.Y.2d at 108, 109-10; *Smith v. Hub Mfg. Inc.*, 634 F. Supp. 1505, 1507-08 9 (N.D.N.Y. 1986) (citing *Voss*). The jury's findings on these issues may *not* be overturned unless there is no valid line of reasoning and no fair interpretation of the evidence which could lead reasonable people to reach the jury's conclusion *Cohen v. Hallmark Cards, Inc.*, 45 N.Y.2d 493, 499 (1978).

Prior to the New York appellate decisions, liability for a negligently designed product in New York

depended upon a finding that the product, as designed, was not reasonably safe. In determining whether a product was reasonably safe, the fact finder was called upon to balance the product's risks against its utility and cost, and instructed that it may consider several non-exclusive factors.

> Those factors may include the following: (1) the utility of the product to the public as a whole and to the individual user; (2) the nature of the product—that is, the likelihood that it will cause injury; (3) the availability of a safer design; (4) the potential for designing and manufacturing the product so that it is safer but remains functional and reasonably priced; (5) the ability of the plaintiff to have avoided injury by careful use of the product; (6) the degree of awareness of the potential danger of the product which reasonably can be attributed to the plaintiff; and (7) the manufacturer's ability to spread any cost related to improving the safety of the design *Voss v. Black & Decker Mfg. Co.*, 59 N.Y.2d 102 at 109 (1983).

The record here established not only that it was possible to design cigarettes satisfying the *Voss* requirements of a *safer functional alternative* design, but that the respondents actually did so, and brought those safer non-addicting cigarettes to the market. The proof established that it was technologically feasible to design and manufacture cigarettes that did not initiate or sustain addiction (less than .4 mg of nicotine) as early as the mid-1960's, when American Tobacco's Carlton brand was introduced. Similarly, as early as 1961, Philip Morris designed and used in research studies cigarettes with .2 mg of

nicotine, and at least by 1978 was manufacturing and marketing its Benson & Hedges lowest brand, with .1 mg of nicotine.

Respondents designed, manufactured and sold at reasonable prices, cigarettes, which they marketed and presented as *fully-functioning cigarettes* to be used by consumers in precisely the same way respondents' addictive high-nicotine cigarettes were used, and which were safer because they contained less nicotine than the .4 mg required to start and sustain addiction.

In offering evidence to prove their case, petitioners *justifiably relied* upon existing product liability law and the history of New York product liability and tobacco litigation, and submitted evidence to establish that it was technologically and economically feasible (reasonable cost) for respondents to manufacture the cigarette recognized by peritioners' experts as being a safer, alternative design.

Equally, if not more significant, is that the trial court, applying then existing New York product liability law, determined that consumer acceptability was *not* relevant in this case. It ruled that commercial viability consisted of proof that the alternate design was reasonably priced and *functional*. The trial Court *specifically excluded consumer acceptability*. The trial court went so far as to state that the issue of why consumers buy things is "so beyond what this trial is about". The trial court decided that consumer acceptability was *not* part of the case and any testimony as to consumer preference was not to be considered.

> . . . there are no issues in this case as to peoples' purchasing cigarettes on the basis

> of taste, that is consumers liking cigarettes or not, thinking one are better than others. That's not part of the issues in this case. *They are out.* So any testimony that's been given up to now, either on direct or cross as to what consumers preferred or did not prefer, is out of the case, and you will no longer consider it. (emphases added).

Both petitioners and the trial court *justifiably relied* upon *then existing New York law* to determine what evidence would be submitted to the jury. It is unfair to dismiss an action because petitioners did not introduce evidence that the trial court ruled irrelevant and inadmissible. The Court of Appeals decision has deprived petitioners of their day in court.

Interestingly, the same New York Appellate Division, First Department that effected the change in the law here, previously affirmed the denial of summary judgment to these respondents in another New York tobacco case (where this law firm represented the plaintiff) that included the same cause of action for negligent design. In *Standish-Parkin v. Lorillard Tobacco Co.*, 12 A.D.3d 301 (1st Dept., 2004), the court affirmed a denial of summary judgment for the negligent design claim where the issue of consumer acceptability was *never* raised and *no* evidence regarding consumer acceptability was proffered. In that case, by affirming the denial of summary judgment without proof of consumer acceptability, the New York Appellate Division, First Department, acknowledged and confirmed that *no* evidence of consumer acceptability was required.

Similarly, the New York Appellate Division, Second Department, denied motions for summary judgment where the issue of consumer acceptability was never raised *Miele v. American Tobacco Co.*, 2 A.D.3d 799 (2nd Dept., 2003); *Tomasino v. American Tobacco Co.*, 23 A.D.3d 546 (2nd Dept., 2005). It is noteworthy that all of these cases were defended by the same law firms that appeared herein at the trial of this case.

Furthermore, respondents in this case made a motion for summary judgment on the negligent design claim and did not raise the issue of consumer acceptability. No proof was proffered on that issue, their motion was denied, and no appeal was taken. Not only has the issue of consumer acceptability never appeared before in the lengthy history of New York tobacco litigation, it was not injected into this case until after petitioners completed their proof at trial.

In offering evidence to prove their case, petitioners justifiably relied upon the existing New York product liability law and the history of New York tobacco litigation.

The petitioners and the trial court *justifiably relied* upon then existing New York product liability law to determine what evidence would be submitted to the jury. The New York Court of Appeals decision affirmed the creation of this new element of proof after the verdict, then used it as a basis to dismiss the action, even though petitioners never had an opportunity to meet it. This is a classic denial of due process.

It is eminently unfair to dismiss petitioners' action based upon failure to put in proof at trial of con-

sumer acceptability, when it was not the law at the time of trial.

If this decision were to stand, it would constitute a denial of due process and a gross miscarriage of justice.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

COURT OF APPEALS
STATE OF NEW YORK

Argued November 18, 2008
Decided December 16, 2008

FRANK ADAMO, as Executor of Norma Rose, Deceased, *et al.*,

Appellants,

—v.—

BROWN & WILLIAMSON TOBACCO CORPORATION, as Successor in Interest to The American Tobacco Company, *et al.*, *Respondents*, *et al.*,

Defendant.

Whiteman Osterman & Hanna LLP, Albany (*Howard A. Levine*, *Alan J. Goldberg*, *Christopher W. Meyer*, *William S. Nolan* and *Christopher M. McDonald* of counsel), and *Finz & Finz, P.C.*, Jericho (*Stuart L. Finz*, *Jay L. Feigenbaum* and *Todd M. Rubin* of counsel), for appellants.

Mayer Brown LLP, New York City (*Andrew H. Schapiro*, *Andrew L. Frey*, *Lauren R. Goldman* and *Scott A. Chesin* of counsel), *Joseph W. Bellacosa*, Garden City, *Arnold & Porter LLP*, New York City (*Keri L. Arnold* and *Angela Showalter* of counsel), *Winston & Strawn LLP* (*Thomas J. Quigley* and

Luke A. Connelly of counsel), *Chadbourne & Parke LLP* (*Thomas E. Riley*, *Ellen Black* and *Cassandre L. Charles* of counsel) and *Arnold & Porter LLP*, Washington, D.C. (*James M. Rosenthal* of counsel), for respondents.

Goldberg Segalla LLP, Buffalo (*Neil A. Goldberg*, *Matthew S. Lerner* and *Bryan D. Richmond* of counsel), and *Hugh F. Young, Jr.*, Reston, Virginia, for Product Liability Advisory Council, Inc., amicus curiae.

James A. Henderson, Jr., Ithaca, for Professor James A. Henderson, Jr., amicus curiae.

Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP, Washington, D.C. (*Rachel Li Wai Suen* of counsel), and *National Chamber Litigation Center, Inc.* (*Robin S. Conrad* of counsel), for Chamber of Commerce of the United States of America, amicus curiae.

OPINION OF THE COURT

Smith, J.

Plaintiffs claim that two cigarette companies were negligent in designing their product, in that they should have used lower levels of tar and nicotine. We agree with the Appellate Division that plaintiffs failed to prove an essential element of their case: that regular cigarettes and "light" cigarettes have the same "utility." The only "utility" of a cigarette is to gratify smokers' desires for a certain experience, and plaintiffs did not prove, or try to prove, that light cigarettes perform this function as well as regular cigarettes.

Norma Rose, who died during the pendency of this appeal, smoked for more than 40 years, consuming more than a pack a day of regular cigarettes. Beginning in the late 1960s, the products she smoked were manufactured by the American Tobacco Company and Philip Morris USA Inc. Ms. Rose quit smoking in 1993, and was diagnosed two years later with lung cancer and another condition allegedly caused by smoking. She and her husband brought a number of claims against American Tobacco's successor (Brown & Williamson Tobacco Corporation), Philip Morris and a third company. All their claims except one for negligent product design were dismissed at the trial level and are not now before us.

A jury found that American Tobacco and Philip Morris negligently designed the cigarettes Ms. Rose smoked and, in later phases of the trial, awarded compensatory and punitive damages. The Appellate Division reversed the resulting judgment, with two Justices dissenting, and granted judgment in defendants' favor (53 AD3d 80 [2008]). Plaintiffs appeal to us pursuant to CPLR 5601(a), and we now affirm the Appellate Division's order.

In *Voss v Black & Decker Mfg. Co.* (59 NY2d 102, 108 [1983]), speaking of a claim of strict product liability, we said: "The plaintiff . . . is under an obligation to present evidence that the product, as designed, was not reasonably safe because there was a substantial likelihood of harm and it was feasible to design the product in a safer manner." While this is a negligence, not a strict liability, case, similar requirements apply—specifically, plaintiffs here had to prove that "it was feasible to design the product in a safer manner." This means, to use again the language of *Voss*, the plaintiffs must show "the

potential for designing . . . the product so that it is safer but remains functional" (*id.* at 109).

Here, plaintiffs presented evidence from which a jury could find that light cigarettes—cigarettes containing significantly lower levels of tar and nicotine—are "safer" than regular cigarettes, but they did not show that cigarettes from which much of the tar and nicotine has been removed remain "functional." The function of a cigarette is to give pleasure to a smoker; plaintiffs have identified no other function. Plaintiffs made no attempt to prove that smokers find light cigarettes as satisfying as regular cigarettes —indeed, it is virtually uncontested that they do not. Both regular and light cigarettes are available on the market, and the enhanced dangers that come from smoking regular cigarettes are well known, but large numbers of consumers continue to prefer regular cigarettes.

It is not necessary in every product liability case that the plaintiff show the safer product is as acceptable to consumers as the one the defendant sold; but such a showing is necessary where, as here, satisfying the consumer is the only function the product has. A cigarette is a different kind of product from the circular saw in *Voss*, whose function was to cut wood, or the molding machine in *Robinson v Reed-Prentice Div. of Package Mach. Co.* (49 NY2d 471 [1980]), whose function was to melt and form plastic.

We find an apt analogy, as the Appellate Division did, in *Felix v Akzo Nobel Coatings* (262 AD2d 447 [2d Dept 1999]). The product involved in *Felix* was a quick drying lacquer sealer made from a highly flammable solvent base. The plaintiff argued that a safer design was "feasible," because a sealer can be

made from a water base, but the plaintiff's expert "admitted that the water-based products take hours longer to dry" (*id.* at 448). The court in *Felix* found that this "functional difference" defeated the plaintiff's case; the plaintiff failed to produce evidence "that there was an alternative, safer design" serving the same function (*id.* at 448, 449). Similarly, here plaintiffs' case fails because plaintiffs failed to show that light cigarettes are equivalent in function, or utility, to regular cigarettes.

Of course we are conscious, as everyone must be, of the irony in speaking of cigarettes' "utility." A strong argument can be made that, when the pleasure they give smokers is balanced against the harm they do, regular cigarettes are worse than useless. But it is still lawful for people to buy and smoke regular cigarettes, and for cigarette companies to sell them. To hold, as plaintiffs ask, that every sale of regular cigarettes exposes the manufacturer to tort liability would amount to a judicial ban on the product. If regular cigarettes are to be banned, that should be done by legislative bodies, not by courts.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Pigott, J. (dissenting).

I respectfully dissent. Plaintiffs met their burden of establishing that defendants were able to design a safer cigarette that maintained the functionality of a regular cigarette (*see Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 109 [1983]). The majority concludes, however, that plaintiffs were required "to

prove that smokers find light cigarettes as satisfying as regular cigarettes," and were further obligated to prove that cigarettes serve some function other than to provide pleasure (majority op at 550). In my view, this language improperly shifts the burden of proving consumer acceptability to plaintiffs.

At trial, defendants moved "to offer evidence tending to prove that the 'safer alternative design' suggested by plaintiffs was not feasible because it was not acceptable to consumers (i.e., not commercially viable)" (10 Misc 3d 680, 696-697 [2005]). The trial court denied that motion, concluding that evidence of commercial viability of the lighter cigarette was irrelevant to its feasibility or functionality (*id.* at 699). That was error and, therefore, I would remit the matter to Supreme Court for a new trial to permit defendants the opportunity to present proof of the alleged commercial unacceptability of the lighter cigarette as compared to the regular cigarette.

Chief Judge Kaye and Judges Ciparick, Graffeo, Read and Jones concur with Judge Smith; Judge Pigott dissents in a separate opinion.

Order affirmed, with costs.

COURT OF APPEALS
STATE OF NEW YORK

Submitted February 9, 2009
Decided March 26, 2009

FRANK ADAMO, as Executor of Norma Rose, Deceased, *et al.*,

Appellants

—v.—

BROWN & WILLIAMSON TOBACCO CORPORATION, as Successor in Interest to The American Tobacco Company, *et al.*, Respondents, *et al.*,

Defendant

Motion for reargument denied with $100 costs and necessary reproduction disbursements [*see* 11 NY 3d 545 (2008)].

Chief Judge Lippman taking no part.

SUPREME COURT OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

April 10, 2008

NORMA ROSE *et al.*,

Respondents,

—v.—

BROWN & WILLIAMSON TOBACCO CORPORATION, as Successor in Interest to American Tobacco, *et al.*, *Appellants*, *et al.*,

Defendant.

Mayer, Brown, Rowe & Maw LLP, New York City (*Andrew H. Schapiro*, *Andrew L. Frey* and *Lauren R. Goldman* of counsel), and *Winston & Strawn LLP*, New York City (*Thomas J. Quigley* and *Luke A. Connelly* of counsel), for Philip Morris USA Inc., appellant.

Chadbourne & Parke LLP, New York City (*Thomas E. Riley* and *Allison M. Alcasabas* of counsel), for Brown & Williamson Holdings, Inc., appellant.

Whiteman Osterman & Hanna LLP, Albany (*Howard A. Levine*, *Alan J. Goldberg*, *Christopher W. Meyer*, *William S. Nolan* and *Christopher M. McDonald* of counsel), and *Finz & Finz, P.C.*, Jeri-

cho (*Stuart L. Finz*, *Jay L. Feigenbaum* and *Todd M. Rubin* of counsel), for respondents.

OPINION OF THE COURT

Friedman, J.

Plaintiff Norma Rose developed lung cancer and neurological damage as the result (it is undisputed) of decades of cigarette smoking. In this action, a jury returned a verdict in favor of Ms. Rose and her husband (suing derivatively) on their claim that the cigarettes she smoked from the 1960s to 1993 were negligently designed. Specifically, it was plaintiffs' contention that, during the years in question, the relevant tobacco companies should have sold only "light" cigarettes (which contain relatively low levels of cancer-causing tar and addictive nicotine) and should not have sold regular cigarettes of the kind Ms. Rose smoked (which contain significantly higher levels of the aforementioned harmful substances). While light cigarettes were available during the relevant period, plaintiffs failed to present any evidence that such cigarettes appeal to more than a small portion of the cigarette-smoking public. Stated otherwise, the record contains no basis for a finding that light cigarettes have the same utility for the vast majority of smokers as do regular cigarettes.

The critical question on this appeal is whether plaintiffs presented a legally sufficient case on their negligent design claim—the only cause of action submitted to the jury—without offering any evidence that the alternative product design they pro-

pose (low-tar, low-nicotine cigarettes) would have been acceptable to the consumers that constituted the market for the allegedly defective product (regular cigarettes). In our view, this question must be answered in the negative. Under New York law, a manufacturer cannot be held liable for failing to adopt an alternative product design that has not been shown to retain the "inherent usefulness" the product offers when manufactured according to the more risky (but otherwise lawful) design that was actually used (*Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 108 [1983]). In the case of cigarettes, in which the product's "usefulness" (such as it is) is the production, not of any objectively observable results, but of certain subjective sensations and feelings in the user (the taste of tar and the psychological effect of nicotine), the product's functionality can only be demonstrated by its acceptability to consumers. Absent any evidence that cigarettes with the low levels of tar and nicotine advocated by plaintiffs would be acceptable in the market for the cigarettes Norma Rose smoked, it cannot be said that plaintiffs have carried their burden of proving that it was "feasible to design the [offending] product in a safer manner" (*id.*). Thus, defendants' motions for a directed verdict and for judgment notwithstanding the verdict should have been granted. We therefore reverse the judgment in plaintiffs' favor and dismiss the complaint.

The standard to be applied in determining (in both negligence and strict products liability actions) whether or not a product is defectively designed is

> "whether the product as designed was 'not reasonably safe'—that is, whether it is a product which, if the design defect were known at the

> time of manufacture, a reasonable person would conclude that the utility of the product did not outweigh the risk inherent in marketing a product designed in that manner" (*Voss*, 59 NY2d at 108; *see also Giunta v Delta Intl. Mach.*, 300 AD2d 350, 353 [2002]).
>
> In trying a case under this standard,"[t]he plaintiff . . . is under an obligation to present evidence that the product, as designed, was not reasonably safe because there was a substantial likelihood of harm and it was feasible to design the product in a safer manner. The defendant manufacturer, on the other hand, may present evidence in opposition seeking to show that the product is a safe product—that is, one whose utility outweighs its risks when the product has been designed so that the risks are reduced to the greatest extent possible while retaining the product's inherent usefulness at an acceptable cost." (*Voss*, 59 NY2d at 108 [citations omitted].)

Among the factors to be considered in the risk-utility analysis is "the availability of a safer design" (*id.* at 109). Further, "[w]here a court, after considering the relevant facts and risk-utility factors, determines that the plaintiff has failed to make out a prima facie case of a design defect, the claim should not be submitted to the jury" (*Scarangella v Thomas Built Buses*, 93 NY2d 655, 659 [1999]).

As the Court of Appeals has noted, the risk-utility analysis mandated by *Voss* is "rooted in a recognition that there are both risks and benefits associated with many products and that *there are instances in which a product's inherent dangers cannot be eliminated without simultaneously compromising*

or completely nullifying its benefits" (*Denny v Ford Motor Co.*, 87 NY2d 248, 257 [1995] [emphasis added]).

Plaintiffs do not dispute that, under the foregoing case law, they cannot prevail on their negligent design claim, as a matter of law, without demonstrating the feasibility of a safer (or, to put it better here, measurably less dangerous) alternative design for the cigarettes Norma Rose smoked. Plaintiffs argue, however, that they carried this burden by showing that, during the years Ms. Rose smoked regular Pall Mall and Benson & Hedges cigarettes, tobacco companies also marketed light cigarettes with lower levels of tar and nicotine. As plaintiffs conceded on the record at trial, they established only the technical feasibility of light cigarettes, which they claimed was all that was required. "The feasibility aspect," their counsel asserted, "is whether or not it can be made." Plaintiffs admittedly offered no evidence on the extent to which light cigarettes would have been acceptable to smokers of regular cigarettes as a substitute for the latter. Plaintiffs' counsel told the court: "[I]t's a whole different trial to determine what is acceptable to a consumer. That's a different case tha[n] we have been trying before your Honor."

In our view, plaintiffs could not make out a prima facie case that light cigarettes were a feasible alternative to regular cigarettes without presenting evidence on consumer acceptability. Contrary to the trial court's stated view, a cigarette's function is not simply "to be lit, burned and inhaled" (10 Misc 3d 680, 698 [2005]). A person presumably could smoke lettuce if cigarettes existed only to provide the smoker with the opportunity to light up and inhale.

To the contrary, the record establishes that people smoke cigarettes to obtain the additional "utility" of the taste provided by the tar and the psychological effect provided by the nicotine; in fact, one of plaintiffs' experts testified that "nicotine is the product that sells cigarettes." It is undisputed that the reduced amounts of tar and nicotine in light cigarettes provide less taste and less psychological effect, respectively. It was plaintiffs' burden to prove that, notwithstanding the reduced taste and psychological effect they provide, light cigarettes could feasibly serve the same function as regular cigarettes for cigarette smokers generally. Again, given the subjective nature of the benefits of smoking, the viability of light cigarettes as an alternative to regular cigarettes could not be demonstrated directly, but only through evidence of their acceptability to consumers—which, to reiterate, was admittedly not part of plaintiffs' case. The issue is not (as plaintiffs suggest) whether tobacco companies would make a profit, but whether the alternative product design would fulfill the public's demand.

In further considering the issue of feasibility of a safer alternative design, it must be recognized that two differently designed products that, like regular cigarettes and light cigarettes, are generally similar in function, may nonetheless yield results so different in quality as to make it impossible to characterize the design of the safer product as a feasible alternative to the design of the more hazardous product. In *Felix v Akzo Nobel Coatings* (262 AD2d 447 [1999]), for example, the plaintiff argued that a quick-drying lacquer sealer, with a highly flammable solvent base, was defective by reason of the availability of water-based lacquer sealers, which,

although slow-drying, were safer. The Second Department, noting that quick-drying, solvent-based lacquer sealers "comprise approximately 95% of the lacquer sealer market" (*id.* at 448), disagreed:

> "The plaintiff's own expert testified . . . that there was no way to make a quick-drying lacquer sealer offering the same results as those from solvent-based lacquer sealers using alternative fluids and that the very nature of quick-drying lacquer sealer necessitates that it contain a highly flammable solvent. He further testified that nothing can be introduced to the formula to make it safer without creating an entirely different product. . . .
>
> "Further, contrary to the plaintiff's contention, the evidence presented clearly shows that water-based products are not essentially the same as the solvent-based lacquer sealer at issue. The plaintiff's expert admitted that the water-based products take hours longer to dry, so that there is a functional difference. . . . Additionally, the plaintiff's expert could not name any water-based lacquer sealers matching the results obtained by the quick-drying, solvent-based lacquer sealer with respect to the appearance of the finish, its hardness, and its scratch-resistant properties." (*Id.* at 448-449.)

Since the record established that "the volatile solvent contained in the defendant's quick-drying lacquer sealer [was] critical to the products' performance," there was no issue as to the availability of "an alternative, safer design," and the complaint was dismissed insofar as it sought recovery based on a

theory of design defect (*id.* at 449; *accord Perez v Radar Realty*, 34 AD3d 305, 306 [2006] [dismissing claim that volatile lacquer sealer was defectively designed where plaintiff "made no showing that utilization of (a) water-based sealer instead of the complained-of (volatile) lacquer-based product would be similarly efficacious"], *affg* 7 Misc 3d 1015[A], 2005 NY Slip Op 50599[U] [Sup Ct, Bronx County 2005]).[1]

Regular and light cigarettes differ from each other, not in the nature of the relevant ingredients (as is the case with solvent-based and water-based sealers), but in the proportions of those ingredients. Still, plaintiffs in this case made no showing that regular and light cigarettes "offer[ ] the same results" (*Felix*, 262 AD2d at 448), or had no "functional difference" from each other (*id.*), in terms of the taste and psychological experience delivered to the consumer. To the contrary, plaintiffs' own experts apparently agreed that the great majority of smokers reject both low-tar and low-nicotine cigarettes. In any event, plaintiffs, not defendants, had the burden of production and persuasion on the issue of the feasibility of an alternative design (*see Voss*, 59 NY2d at 108 ["The plaintiff, of course, is under an obligation to present evidence that . . . it was feasible to design the product in a safer manner"]). Since, as their counsel admitted at trial,

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[1] The dissent posits that light and regular cigarettes must be deemed functionally interchangeable unless it is shown that most smokers of regulars would quit smoking if lights were the only cigarettes available. This notion is inconsistent with the *Felix* and *Perez* decisions, which held that slow-drying sealers are not feasible alternatives to fast-drying sealers, notwithstanding that consumers would undoubtedly turn to slow-drying sealers if fast-drying sealers became unavailable.

plaintiffs offered no evidence of the consumer acceptability of light cigarettes—which was the only way to prove that light cigarettes were a feasible alternative design—plaintiffs failed to make out a prima facie case of negligent design, and were not entitled to have this claim (the only one at issue on appeal) submitted to the jury.[2]

Nor can it plausibly be argued that plaintiffs established defendants' liability on the ground that the cigarettes Ms. Rose smoked did not pass the three-factor test for nondefectiveness set forth in *Scarangella* (93 NY2d at 661). The *Scarangella* factors are not generally applicable in all design defect cases, but are only used to determine whether "a product without an optional safety feature is defectively designed because the equipment was not standard" (*id.*). The question of whether an optional feature should have been made standard does not arise unless the product would have served essentially the same function with or without that feature.[3] This was clearly true of the bus in *Scarangella*

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[2] On appeal, plaintiffs point to testimony by one of their experts that low-nicotine cigarettes would "have some stimulating action, but not be addicting." Plaintiffs now assert that, to the extent they were required to prove that light cigarettes serve the function of producing a "stimulatory effect," the referenced testimony "supports the conclusion that cigarettes with nicotine levels below the addiction threshold would serve that function." The question, however, is not whether low-nicotine cigarettes would have any "stimulatory effect" at all, but whether that effect would be of sufficient magnitude to satisfy the smoking public.

[3] An automobile and a motorcycle are both means of motorized transportation, for example, but that does not mean that they are so interchangeable in function that a motorcycle is defective because it provides the rider with less protection than

(which lacked an optional backup alarm), but, to reiterate, plaintiffs here failed to establish that light and regular cigarettes serve the same function. The dispositive question in this case is whether these two differently designed products have the same utility for the consumer, and the *Scarangella* factors simply are not addressed to that inquiry. Thus, in *Perez v Radar Realty* (*supra*), the lacquer case in which we faced a question similar to the one presented here, we did not refer to the *Scarangella* factors.

Further, while plaintiffs and the dissent argue that evidence of the market acceptability of light cigarettes is not relevant to the issue of their feasibility as an alternative to regular cigarettes, they do not suggest any other means of proving the functional interchangeability of two products that (unlike the lacquers at issue in *Felix* and *Perez*) serve a utility that is entirely subjective. The result of plaintiffs' approach would be to assume that they have proven one element of their cause of action without presenting any evidence on it. This would be error.

It is no answer to say, as the dissent does, that, even if consumer acceptability is relevant, the evidence *defendants* proffered on that issue was insufficient to establish that light cigarettes are not a feasible alternative to regular cigarettes. It must be borne in mind that the feasibility of the alternative design was an element of *plaintiffs'* affirmative case, on which *plaintiffs* had the burden of proof. As previously discussed, consumer acceptability is

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an automobile. Even plaintiffs presumably would not go so far as to argue that light cigarettes are feasible alternatives to cigars and pipes.

the only way to demonstrate the feasibility of light cigarettes as an alternative to regular cigarettes, and plaintiffs have admitted that they presented no evidence of the acceptability of light cigarettes to consumers of regular cigarettes. Thus, whether or not the dissent is correct about the strength of defendants' evidence on consumer acceptability (and we do not think it is), plaintiffs failed to prove their case.[4]

The dissent also argues that plaintiffs should not be required to show the consumer acceptability of light cigarettes because the consumers in question are "nicotine addicts—a class of consumer created by the defendants [and other tobacco companies] through their admitted manipulation of nicotine levels."[5] The premise of this argument is that it is

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[4] The position of plaintiffs and the dissent—that evidence of consumer acceptability is never needed to demonstrate the feasibility of an alternative product design—finds no support in decisions like *Voss*, which concerned products used to produce objective, physical results (e.g., the power saw in *Voss*). Given the nature of the products at issue, *Voss* and similar cases presented no occasion to discuss consumer acceptability as a measure of the feasibility of a proposed alternative product design. Again, consumer acceptability becomes relevant to the feasibility inquiry only where, as here, the product at issue is one used to produce subjective results in the user.

[5] It is not strictly accurate to say, as the dissent seems to imply, that nicotine addiction originated with the manipulation of the nicotine levels of cigarettes. After all, it is undisputed that people were smoking cigarettes long before the 1950s and 1960s, when the tobacco industry developed the capability to adjust nicotine levels. We also note that the injured plaintiff in this case, Norma Rose, began smoking in the late 1940s, and thus had already been addicted to cigarettes for more than a decade when she began smoking the brands (Pall Malls in the 1960s and Benson & Hedges in the 1970s) for which the defendants bring-

appropriate for a court, through the imposition of tort liability, to retroactively outlaw the satisfaction of the demand for a given product, notwithstanding that the satisfaction of that demand has long been consciously tolerated—and taxed and regulated—by the political branches of government. For the reasons that follow, we reject this premise.

It is, of course, incongruous to speak of a toxic product, which offers only fleeting sensual pleasure while sickening, disabling and killing multitudes each year, as serving a "function," or having "utility," for the consumer. Nonetheless, cigarettes plainly serve some subjective function or utility for smokers; if this were not true, the tobacco companies would quickly go out of business. Thus, an affirmance of the judgment holding defendants liable for the severe health effects of regular cigarettes, regardless of plaintiffs' failure to prove that any alternative product design would feasibly serve the same function, would essentially outlaw the satisfaction of the demand for any product serving that function. As a federal judge of the Southern District of New York recently observed in rejecting an argument similar to the one made by plaintiffs here, such an "impos[ition] [of] state law tort liability on the manufacture and sale of virtually every cigarette now on the market" would constitute "a virtual ban on cigarettes, just as a requirement that allows only 'alcohol-free' liquor to be sold would be a ban on whiskey" (*Clinton v Brown & Williamson Holdings, Inc.*, 498 F Supp 2d 639, 648 [SD NY 2007]).

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ing this appeal are responsible. The jury exonerated defendant R.J. Reynolds Tobacco Company, the maker of the brand Ms. Rose smoked in the 1950s (Camels).

One could reasonably argue, on both moral and policy grounds, that regular cigarettes are so dangerous that they should be outlawed, regardless of the absence of any feasible alternative design that would serve the same function. Then again, one could also argue that the virtual prohibition of a product that has been as widely used, and for as long a period of time, as regular cigarettes, would be too costly, and too difficult to enforce, to say nothing of the fact that it could be considered an unwarranted intrusion on individual autonomy.[6] Whatever position one takes on the merits of this important policy issue, we believe that whether to make as sharp a break with past practice as the one plaintiffs advocate, and to accept the undoubtedly vast social and economic consequences of such a change of course, is a political decision resting with the legislative branch of government or with regulators acting pursuant to a legislative grant of authority. The decision is not, we submit, one appropriately made by the judicial branch. According to one scholar, this is the view taken by most courts that have been presented with the issue (*see* Owen, *Inherent Product Hazards*, 93 Ky LJ 377, 383 [2004-2005] ["the vast majority of courts have been markedly unreceptive to the call that they displace markets, legislatures, and governmental agencies by decreeing whole categories of products to be 'outlaws' "], quoted in *Clinton*, 498 F Supp 2d at 648).

In our view, the foregoing considerations warrant reversing the judgment appealed from, and dis-

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[6] As noted by Dr. Blackie, a defense expert witness quoted in the dissenting opinion, one possible consequence of prohibiting a product that has been widely used for generations is the creation of a "black market" for that product.

missing the complaint, without reaching defendants' other arguments. It is worth reiterating, however, that, on the issue of proximate cause, the record contains evidence suggesting not only that light cigarettes are inherently unsafe products (which no one disputes), but that they may create even greater risk of harm by inducing smokers to "compensate" for the reduced delivery of tar and nicotine by increasing the number of cigarettes smoked, the frequency of puffing, or the depth and duration of inhalation. Plaintiffs do not identify any expert evidence in the record providing a reasoned basis for concluding that, in spite of the possibility of such "compensation," the net effect of smoking light cigarettes is, on average, to reduce the smoker's ingestion of tar and nicotine and thereby to reduce the risk of cancer. Nor do plaintiffs identify expert evidence specifically excluding the possibility that a previously nicotine-addicted person may, due to such "compensation," maintain the addiction by smoking light cigarettes with nicotine content below the generally recognized addiction threshold. In this regard, it is significant that, as previously noted, Ms. Rose was already addicted to cigarettes when she began smoking the brands of the defendants that were held liable by the jury.

For the reasons discussed above, we reverse the judgment and dismiss the complaint. Of course, since plaintiffs failed to make out a prima facie case for holding defendants liable for compensatory damages, there is no basis for the award of punitive damages against defendant Philip Morris USA Inc.

Accordingly, the judgment of the Supreme Court, New York County (Karen S. Smith, J.), entered July 18, 2005, which, insofar as appealed from, after a

jury trial, awarded plaintiffs damages against defendants Brown & Williamson Holdings, Inc. and Philip Morris USA Inc. based on a cause of action for negligent product design, should be reversed, on the law, without costs, the aforesaid defendants' motions for a directed verdict and for judgment notwithstanding the verdict granted, and the second amended verified complaint dismissed. The Clerk is directed to enter judgment accordingly.

Catterson, J. (dissenting). Because I believe that consistent with well-established principles of products liability jurisprudence the plaintiffs fulfilled their burden of demonstrating that a safer alternative was not only feasible but, in fact, was manufactured, I must respectfully dissent. Evidence adduced at trial sufficiently established that the safer alternative ultra light was the same as a regular cigarette in all respects save for its nonaddictive levels of nicotine and cancer-causing tar. Thus, I find no legal merit in the defendants' assertion, which the majority supports, that the plaintiffs had an additional burden to show consumer acceptability of the nonaddictive product. In my view, this is nothing more than a cynical effort by the defendants to maintain the commercial advantages of continuing to sell unreasonably dangerous addictive products to addicts.

This appeal arises from a jury verdict of liability on the grounds of negligent design defect. It presents a singular issue: whether the defendant cigarette manufacturers negligently designed and marketed cigarettes containing addictive levels of nicotine, and whether the design increased the plaintiff Norma Rose's exposure to cigarette tar and known carcinogens.

In my view, the plaintiffs fulfilled their burden of showing defective design by establishing that there was a feasible safer alternative and that the defendant manufacturers should have ceased manufacturing and marketing cigarettes with .4 milligram of nicotine and more per cigarette (hereinafter referred to as regular cigarettes).

In summary, evidence adduced at trial established that the defendants knew that .4 milligram of nicotine per cigarette was a threshold level for creating and sustaining addiction; that defendants were able to manipulate the levels of nicotine in cigarettes as far back as the 1950s and 1960s; and that defendants were able to, and in fact, did produce cigarettes with lower levels of nicotine and lesser amounts of tar (hereinafter referred to as ultra lights).

Further, the testimony of expert witnesses established that in virtually every respect ultra lights were the same product as regular cigarettes. The essential difference lay in the different amounts of nicotine and tar, rendering ultra lights with the lesser and nonaddictive levels of nicotine the safer alternative because they would not create or sustain addiction. Thus, in my opinion, the evidence established that ultra lights were a feasible safer alternative within the generally accepted meaning of feasibility.

It is the defendants' contention, however, that such a traditional analysis is insufficient. The defendants argue, and the majority supports their view, that an additional element is required to establish feasibility in this case. Evidence notwithstanding, they argue that utility, and therefore feasibility, may only be demonstrated by evidence of consumer acceptability. Moreover, the defendants submit that

they acted reasonably in marketing both regular cigarettes and ultra lights, and that they were not obligated to cease manufacturing and marketing cigarettes with addictive levels of nicotine because consumers rejected ultra lights.

I do not find this argument persuasive. First, consumer acceptability cannot be a factor in determining feasibility when the consumers are nicotine addicts—a class of consumer created by the defendants through their admitted manipulation of nicotine levels. It is hardly illuminating that sales and marketing data would show that nicotine addicts prefer cigarettes with sufficient levels of nicotine to sustain their addiction with minimum effort. Second, much of the evidence that the defendants wanted to proffer to establish consumer rejection of ultra lights amounted to testimony of consumer complaints about taste and the difficulties with "draw." None of the proffered evidence would have established that given the choice between ultra lights or no cigarette at all, smokers would have rejected the ultra lights and quit smoking, and thus that ultra lights were unacceptable to consumers.

Further, the uncontroverted evidence was that plaintiff Norma Rose was determined to quit smoking but that she engaged in 15 failed attempts because she was severely addicted. Thus, a jury could rationally conclude that it was the addictive level of nicotine in regular cigarettes that thwarted her attempts to quit, and so it was the design defect that led to more than 50 years' continued exposure to cancer-causing tar which was a substantial factor in causing her lung cancer.

It is undisputed that Norma Rose, now 73 years of age, began smoking cigarettes in the late 1940s. In

the 1950s she became a regular smoker, preferring Camels, manufactured by R.J. Reynolds. She soon began smoking at least a pack a day. In the 1960s, she began smoking Pall Malls, manufactured by the American Tobacco Company, now nonexistent by reason of merger with Brown & Williamson Tobacco Corp.

She continued smoking Pall Malls until 1973 or 1974, when she began smoking filtered cigarettes. Briefly, she used two low tar brands, Merit and Vantage, but did not like their taste. She then began smoking Benson & Hedges, manufactured by defendant Philip Morris USA. Norma Rose finally quit smoking in 1993 after approximately 15 failed attempts to do so.

In 1995, she was diagnosed with lung cancer and a related neurological condition, paraneoplastic cerebellar degeneration. The lung cancer is in remission, but she still suffers from the neurological condition, which has caused permanent brain damage.

This lawsuit was brought against six cigarette manufacturers and two tobacco industry research organizations. Many defendants were dismissed from the action, and only Philip Morris, R.J. Reynolds, and Brown & Williamson were remaining at the time of trial.

Ultimately, the trial proceeded on a single theory of liability with all other claims being either dismissed or withdrawn before trial. The plaintiffs alleged that the defendants negligently designed and marketed cigarettes containing addictive levels of nicotine which was a substantial factor causing plaintiff's injury because it significantly increased her aggregate exposure to cancer-causing cigarette tar. The plaintiffs' theory was that an ultra light

cigarette, containing very low tar, or very little nicotine so as to be nonaddictive was the reasonable feasible alternative design to the cigarettes manufactured by defendants, and that defendants should have ceased manufacturing regular cigarettes with more than .4 milligram of nicotine per cigarette.

The trial proceeded in three phases. During Phase I, the jury determined liability and compensatory damages. At trial, the defendants conceded that cigarettes cause cancer. The plaintiffs submitted evidence that one in every six deaths in the United States results from cigarette smoking. A 1979 Surgeon General's Report documented cigarette smoking as the single most important preventable environmental factor contributing to illness, disability and death in the United States. American Tobacco was aware as early as the 1930s that cigarette smoke contained carcinogens, and Philip Morris knew as of the 1950s that there were carcinogens and cancer promoters in cigarettes. In 1961, during a Philip Morris presentation, it was indicated that at least 40 compounds in cigarette smoke were carcinogens.

The plaintiffs proffered evidence that the greater a smoker's cumulative exposure to tar, the greater the risk of developing cancer. Conversely, less aggregate exposure to tar results in lower cancer risks. Exposure to reduced levels of tar, such as cigarettes with 5 to 6 milligrams of tar, in comparison with 16 or 17 milligrams of tar, results in a 20% to 50% reduction in lung cancer risk.

There was also substantial evidence as to the addictive properties of nicotine, of which the defendants were aware as of 1959. According to the plain-

tiffs' expert psychopharmacologist, Dr. Glassman, Mrs. Rose was "severely addicted" to nicotine.

Another plaintiffs' expert, Dr. Wigand, testified that .4 milligram of nicotine represents a key threshold, below which cigarettes would not initiate a new addiction, and would not sustain an existing addiction. The defendants were able to design and manufacture cigarettes with less than .4 milligram of nicotine in the 1950s and 1960s.

Notably, American Tobacco released its Carlton brand in 1964, containing .3 milligram of nicotine. Philip Morris introduced Benson & Hedges' lowest-nicotine brand, with .1 milligram of nicotine, in 1978. Both companies simultaneously continued production of brands containing higher nicotine levels.

As early as 1968, American Tobacco conducted experiments to increase nicotine content in cigarettes. Dr. Wigand testified that cigarette manufacturers added sugars and other additives to enhance the effects and release of nicotine. A 1978 Philip Morris document referred to research aimed at ensuring the total nicotine in the system remains at or near the nicotine need threshold, maximizing the proportion of the day's cigarette consumption which is smoked out of need.

After seven weeks of trial, the court denied the defendants' motion for a directed verdict. The court held that the plaintiffs had established a prima facie claim because the defendants knew that cigarettes caused lung cancer and addiction; that at the time they had the knowledge and technical feasibility to manufacture a safer product; that they chose to continue marketing the regular (defectively designed) cigarettes; and that the defectively designed product was a substantial factor in the plaintiff's injuries.

Subsequently, the jury returned a verdict for the plaintiffs, assessing damages in the amount of $3,420,000 to be divided equally between Philip Morris and Brown & Williamson. The jury found no liability against R.J. Reynolds. The defendants moved for judgment notwithstanding the verdict. The court denied this motion also finding that the defendants had failed to sustain their burden of proving either that there was no valid line of reasoning or permissible inferences which could possibly lead rational persons to the conclusion reached by the jury, or that there was no fair interpretation of the credible evidence to support the jury's verdict.

During Phase II, the jury considered punitive liability, and in Phase III, the amount of punitive damages. At the end of Phase II, the jury found that only Philip Morris was liable for punitive damages. After hearing evidence in Phase III of Philip Morris's financial structure and resources, the jury awarded the plaintiffs $17,100,000 in punitive damages.

On appeal, the defendants-appellants, Brown & Williamson and Philip Morris, contend that the plaintiffs failed to establish the essential elements of their claim. They also argue that the trial court excluded key, relevant evidence including that of consumer awareness, preferences and acceptability, and improperly charged the jury during the liability phase of the trial. The defendants further submit that the plaintiffs' negligence claim, as it was sent to the jury, was preempted by federal law. Finally, defendant Philip Morris argues that the punitive damages award is not sustainable.

For the reasons set forth below, I disagree with the majority and believe we should affirm the jury verdict of liability.

In a defective design cause of action, a claim for negligent design defect is functionally synonymous with a claim for strict products liability with respect to the manufacturer. (*Denny v Ford Motor Co.*, 87 NY2d 248, 258 [1995].) In order to establish a prima facie case of negligent design defect, the plaintiff must prove that the manufacturer failed to exercise reasonable care in designing the product, and that it knew or should have known of the dangerous condition of the product. (*Giunta v Delta Intl. Mach.*, 300 AD2d 350, 352 [2d Dept 2002].) To prevail in strict products liability, a plaintiff must prove that the product contained an unreasonably dangerous design defect. (*Id.*) Thus, the plaintiff in a design defect action "must show that the manufacturer breached its duty to market safe products when it marketed a product designed so that it was not reasonably safe and that the defective design was a substantial factor in causing plaintiff's injury." (*Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 107 [1983].)

It is the plaintiff's obligation to present evidence that "the product, as designed, was not reasonably safe because there was a substantial likelihood of harm and it was feasible to design the product in a safer manner." (*Id.* at 108.)

The defendant manufacturer, on the other hand, may present evidence in opposition seeking to show that the product is a safe product—that is, "one whose utility outweighs its risks when the product has been designed so that the risks are reduced to the greatest extent possible while retaining the product's inherent usefulness at an acceptable cost." (*Id.*)

The defendants conceded at trial that tar and nicotine are dangerous and that it is technologically fea-

sible to produce a cigarette that has safer levels of tar and nicotine. Indeed, evidence showed that the defendants had manufactured and marketed safer alternatives including ultra lights with markedly lower levels of nicotine and tar.

The defendants, however, assert that it was not feasible to cease manufacturing and marketing regular cigarettes because ultra lights do not have the same consumer acceptability. Further, they argue that they are insulated from liability because they offered consumers the safer alternatives including ultra lights alongside the regular cigarettes. For the latter assertion, the defendants rely on *Scarangella v Thomas Built Buses* (93 NY2d 655 [1999]).

In *Scarangella*, an employee of a school bus company who was injured when she was struck by a bus operated in reverse, argued that a backup alarm, which was an optional safety feature, should have been a standard feature for the bus. The Court found, as a matter of law, that where evidence and reasonable inferences show that the buyer, not the manufacturer, is in the superior position to make the risk-utility assessment, and there is a well-considered decision by the buyer to dispense with the optional safety equipment this would excuse the manufacturer from liability. (*See also Pigliavento v Tyler Equip. Corp.*, 248 AD2d 840 [3d Dept 1998], *lv dismissed and denied*92 NY2d 868 [1998] [no negligent design where platform guardrail was available as optional equipment and 85% of concrete truck purchasers declined this option primarily because of its tendency to catch trees]; *see also Jackson v Bomag GmbH*, 225 AD2d 879 [1996], *lv denied* 88 NY2d 805 [1996].)

Scarangella applies the fundamental precept of products liability jurisprudence holding a manufacturer liable for selling a defectively designed product "because the manufacturer is in the superior position to discover any design defects and alter the design before making the product available to the public." (93 NY2d at 659 [internal quotation marks and citation omitted].) Nevertheless, the Court found that if three essential elements are all met, a moderately priced safety feature need not be incorporated into the product design as standard equipment, but can be offered to consumers as an add-on option. The three elements are:

> "(1) the buyer is *thoroughly knowledgeable* regarding the product and its use and is actually aware that the safety feature is available; (2) there exist *normal circumstances of use* in which the product is *not unreasonably dangerous* without the optional equipment; and (3) the *buyer is in a position*, given the range of uses of the product, *to balance the benefits and the risks of not having the safety device in the specifically contemplated circumstances of the buyer's use* of the product." (*Id.* at 661 [some emphasis added].)

In my view, to the extent the defendants cite *Scarangella* in order to assert that they satisfied their duty of care by offering safer ultra lights as an option, they clearly fail. First, the optional safety features in *Scarangella* were safety devices that were added on to the standard product. In this case, nothing can be added by the consumer onto or into regular cigarettes to render them safer. Further, it was the defendants' burden to show compliance

with all three of the required *Scarangella* elements to excuse the manufacturer from liability.

The record on appeal indicates that not one of the three essential *Scarangella* elements was satisfied. First, the defendants could not show that the plaintiff was "thoroughly knowledgeable" regarding the product and "in a position to balance the benefits and the risks" of smoking high-yield cigarettes, so that she, not the manufacturer (of cigarettes) was in the *superior* position to make the risk-utility assessment to smoke regular cigarettes. Indeed, the evidence is directly to the contrary.

Specifically, the defendants knew by 1959 that cigarettes were addictive. At least by 1972, the industry knew that nicotine was the active addictive constituent of cigarettes. As set forth above, the defendants knew in the 1960s that cigarette smoke contained at least 40 carcinogenic compounds, possibly including nitrosamines, "the most potent carcinogens known." The industry confirmed in 1982 that nitrosamines were present in "significant amounts." The plaintiff, on the other hand, was a consumer who typically would have received information about the hazards of smoking from the news outlets of the time, and from the warnings on cigarette packs. The warning labels were not mandatory until 1969.

The defendants argue that they were erroneously precluded from submitting evidence of consumers' knowledge of the health risks of smoking. In my opinion, the evidence properly precluded by the court included, inter alia, the defendants' "string-and-flash" 40-minute video showing every newspaper headline and TV show that purported to have any information whatsoever about tobacco at the

time. Moreover, there was no attendant offer of proof that the plaintiff or any other rational consumer had actually read or seen any of this information. Second, the defendants' burden pursuant to a *Scarangella* analysis was to show that the plaintiff had *superior* knowledge and was in a *superior* position as a buyer to make the relevant decision as to which cigarette to purchase and smoke. Since the record clearly establishes that it was the defendants, not the plaintiff, who were actively and extensively researching tobacco and smoking habits since the early 1930s, any conceivable suggestion that the defendants could satisfy the first and third *Scarangella* elements with regard to the plaintiff is patently absurd.

It is, however, the second *Scarangella* element that, in my opinion, ultimately defeats any defense that the defendants have, since they cannot show that there are any "normal circumstances of use" under which regular cigarettes are "not unreasonably dangerous." The plaintiffs assert that there simply are no circumstances, normal or otherwise, when regular cigarettes are "not unreasonably dangerous." They point to the statistics in the 1979 Surgeon General's Report that show, for example, that one in every six deaths in the U.S. is the result of smoking and that smoking causes 87% of lung cancer deaths.

The plaintiffs, however, cannot rest on that assertion. It is not sufficient to show that a product is dangerous. As the defendants correctly contend, manufacturing and marketing dangerous products is not per se negligent. (*See Forni v Ferguson*, 232 AD2d 176 [1st Dept 1996]; *see also Robinson v Reed-Prentice Div. of Package Mach. Co.*, 49 NY2d 471,

479 [1980] [some products, for example, knives, must by their very nature be dangerous to be functional].) Instead, a defective design cause of action must establish that a product is *unreasonably* dangerous or "not reasonably safe"—that is, there is a substantial likelihood of harm and a feasible safer alternative design. (*Voss*, 59 NY2d at 108.)

Conversely, for the defendants to succeed in their claim that there are circumstances when regular cigarettes are "not unreasonably dangerous," they must show that there are normal circumstances when the utility of regular cigarettes outweighs the risk inherent in them. (*Id.*; *see also Rainbow v Elia Bldg. Co.*, 79 AD2d 287, 294 [1981] [balancing process weighs the benefits of a particular manufacturing design against the risks of using it].)

When pressed at oral argument, however, the defendants had no rejoinder to the question of what circumstances might render regular cigarettes "not unreasonably dangerous" or, in other words, when they would be "reasonably safe." Understandably so. As one federal court recently observed, defendants in tobacco cases "wish to avoid having to make the awkward argument that their product's 'utility' outweighs its risk, when their product is known to 'sicken and kill hundreds of thousands of Americans each year for the 'benefit' of satisfying an addiction.' " (*See Clinton v Brown & Williamson Holdings, Inc.*, 498 F Supp 2d 639, 647 [SD NY 2007], quoting David G. Owen, *Inherent Product Hazards*, 93 Ky LJ 377, 381 [2004-2005].)

The defendants' desire to avoid that particular line of reasoning is abundantly clear in the instant case. Indeed, the defendants construct an entire defense —120 pages of briefs and reply briefs—around the

proverbial "800-pound gorilla" without even alluding to its presence in the room. The defendants simply ignore the fact that the overwhelming majority of smokers smoke because they are addicted to nicotine.

Instead, the defendants' risk-utility assessment proceeds along the following lines:

> "[P]eople smoke cigarettes because they like the taste that tar creates in the smoke," and they "desire the pharmacological effect of nicotine";
>
> Because a sensory experience is subjective, the utility of regular cigarettes can only be demonstrated by consumer choice;
>
> In this case, utility is unquestionably demonstrated by the fact that "many people choose to smoke [regular cigarettes] in the face of Congressional warnings and with the full knowledge of the risks including addiction";
>
> The lesson of *Scarangella* . . . as well as the long line of New York cases holding that it is not negligent simply to sell dangerous products—is that *consumer choice* is a critical component of the *reasonableness* of a product's risks;
>
> Further, smokers' choice of regular cigarettes shows that while safer ultra lights are technologically feasible, it is not feasible to cease manufacturing and marketing regular cigarettes because ultra lights are not the same product;

Sales and marketing data would have provided proof of all of the above, had the trial court not erroneously excluded that evidence.

Thus, the defendants persuade the majority that regular cigarettes are "not unreasonably dangerous" because the majority of smokers, knowing they risk sickness, cancer, disability and death, nevertheless choose to smoke regular cigarettes simply because they are enjoyable, tasty and relaxing, and they cannot get the same "benefits" from ultra lights.

First, in my view, the foregoing circumstances cannot be characterized as in any way "normal." The conduct of smokers as described is in direct contravention to normal consumer reaction. As noted, for example, in the apple/Alar scare of 1989, generally mass rejection, if not panic, follows when a product is identified as containing carcinogens or ingredients likely to cause sickness and death. (*See* Elizabeth Whelan, *The Chemical Scare: Are Politics Driving the Fear?*, Heritage Lecture No. 295, The Heritage Foundation [1990], available at http:// www.heritage.org/Research/SocialSecurity/HL295.cfm.)

Second, the defendants' argument that because a cigarette's function is to provide a sensory experience its utility can only be measured by consumer choice and acceptability is, in my view, circular, self-serving, and without legal merit. While smoking can indeed be described as a sensory experience, the focus of the argument in this case—the relative levels of nicotine with their attendant amounts of tar—is a factor that does not foreclose an objective assessment as to utility or feasibility.

Both the plaintiffs and the defendants agree that the essential function of a cigarette is as a delivery system for nicotine, and that cigarettes provide "pleasure and relaxation." Both sides agree that both ultra lights and regular cigarettes deliver nicotine as

well as tar. Although there was some testimony about the differences in taste, along with the dubious assertion by the defendants that smokers "like" the taste of tar in regular cigarettes, there is no evidence in the record to suggest that an ultra light looks any different or feels any different to hold between the lips or between fingers. Nor is there any evidence that an ultra light either costs more to manufacture or to purchase. As such, an ultra light cannot be characterized as a product that is different from a regular cigarette. In this regard, the defendants' and the majority's reliance on *Felix v Akzo Nobel Coatings* (262 AD2d 447 [2d Dept 1999]) is misplaced. In *Felix*, the Court found that a water-based wood sealer offered as an alternative to a petroleum-based highly flammable product was a different product. Setting aside the fact that the plaintiff's expert testified that the alternative was a different product, in that case, in addition to the difference between the ingredients contained in the product (petroleum-based ingredients versus water), there were several other considerable differences between them including the time taken for the drying process, the look of the finished product, and a prohibitive cost difference. Additionally, the danger of explosions by using the petroleum-based wood sealer was limited to a negligible number of accidents among a very limited population. In this case, not even the ingredients are different; the difference lies simply in the levels of nicotine and the amount of tar, that is, an ultra light contains less than .4 milligram of nicotine per cigarette while a regular cigarette contains .4 milligram or more of nicotine. The record shows .4 milligram is indisputably the level that creates and sustains addiction, and so

increases exposure to tar. Consequently, consumer acceptability cannot be a measure for utility or feasibility in this case. To proffer sales and marketing data as evidence that given a choice, a smoker who is addicted to nicotine will choose a product that satisfies the addiction is, in my opinion, a tautological exercise and therefore meaningless. Second, the concept of choice is itself suspect in this situation. As the trial court aptly observed, "one who is addicted has lost the ability to make free choices concerning the substance of the addiction." (*Rose v Brown & Williamson Tobacco Corp.*, 10 Misc 3d 680, 690 [Sup Ct, NY County 2005].)

> "By definition one who suffers from addiction is compelled to continue an activity even though he or she knows the activity is detrimental [because] even though a cigarette smoker may be made fully aware of the elevated risks, if he or she is addicted to smoking, he or she may not be making a free choice to participate in the activity of continued smoking." (*Id.*)

Third, case law is replete with products liability actions where consumers have found safer alternatives "unacceptable" and have modified safety features without manufacturers or courts declaring these safer alternatives unfeasible. (*See Montufar v Shiva Automation Serv.*, 256 AD2d 607 [2d Dept 1998]; *Mackney v Ford Motor Co.*, 251 AD2d 298 [2d Dept 1998]; *Wyda v Makita Elec. Works*, 232 AD2d 407 [2d Dept 1996].)

In this case, while the issue of taste (the amount of tar in the cigarette) was raised in testimony as one factor that made ultra lights unacceptable, more significant was the testimony of Dr. Blackie, an

expert witness for the defendants, that smokers did not like ultra lights because of the problem with "draw." In the sense that smokers complained about the effort involved in getting nicotine into their system, their "lack of acceptance" is analogous to that of workers or employers in the foregoing cases discarding or removing safety features because they slow down the work process. The decisions in those cases, however, do not reflect any support for the argument that lack of acceptance by consumers absolves the manufacturer from manufacturing the technologically feasible safer alternative, or even from warning a consumer about the danger of modifying a safety feature. (*See Montufar*, 256 AD2d at 607-608.)

In any event, any sales or marketing data the defendants may have submitted to the jury on the issue of consumer acceptability or preferences would merely have shown that when ultra lights and regular cigarettes were offered side by side, and incidentally at a time when consumers had little idea of the health effects, consumers *preferred* to smoke the high-yield cigarettes. Demonstrating consumer preference when options are available is a far cry from the unequivocal statement that given only one type of product, smokers would have rejected it.

In my opinion, the plaintiffs are correct in their assertion that traditional products liability jurisprudence does not require consumer acceptability to be an element proving feasibility. (*See Rypkema v Time Mfg. Co.*, 263 F Supp 2d 687, 692 [SD NY 2003] [a federal court applying New York law to a design defect case held that plaintiff may prove a feasible safer alternative design with evidence that such design is "within the realm of practical engineering

feasibility"]; *see also Micallef v Miehle Co., Div. of Miehle-Goss Dexter*, 39 NY2d 376, 386 [1976] [alternative is not feasible if product was "unworkable" or so expensive as to be priced out of the market].)

According to those principles, I believe the plaintiffs in this case established that there was a feasible safer alternative. The defendants agreed that a safer alternative was technologically feasible. They argued, however, that it was not feasible to manufacture and market only the safer alternative because the safer alternative did not have the same utility as the regular cigarettes. It therefore became the defendants' burden to show that the safer alternative had not retained its inherent usefulness. (*See Voss*, 59 NY2d at 108 ["The plaintiff . . . is under an obligation to present evidence that . . . it was feasible to design the product in a safer manner. The defendant manufacturer, on the other hand, may present evidence in opposition"].) The defendants then argued that "inherent usefulness" or utility could only be demonstrated by evidence of consumer acceptability—an assertion with which I disagree for the reasons already noted.

The defendants further maintained that they had acted reasonably in manufacturing and marketing both regular and ultra light cigarettes because consumers rejected ultra lights and showed a clear preference for regular cigarettes. On appeal, the defendants asserted that a new trial is warranted on the grounds that the trial court excluded evidence of consumer preferences.

In my opinion, the proffered evidence which the trial court ruled out did not establish that smokers had rejected ultra lights. There was no evidence or testimony from the defendants that established that

smokers would not purchase ultra lights. Rather, the evidence proffered by the defendants established that there were characteristics that smokers did not like about ultra lights. Surveys conducted by the defendants found that safer levels of nicotine and tar "adversely affected taste." There was abundant testimony as to consumer complaints about "draw" and the inability to "get any flavor through." There was also testimony that the modifications used to make cigarettes safer "result in significant changes in the flavor and the sensory characteristics of the product . . . That's always been a problem."

At no time, however, did the defendants effectively connect the dots and offer evidence to show that smokers who were faced with purchasing either ultra lights or no cigarette at all had refused to purchase the ultra lights. In fact, as one line of questioning established, consumer acceptance, preferences and taste have little to do with feasibility where cigarettes are concerned. Upon cross-examination of Dr. Blackie, an expert witness for the defendants, the plaintiffs established that during the 1960s, most smokers preferred unfiltered cigarettes to cigarettes with filters which reduced carcinogens. Dr. Blackie testified that therefore the unfiltered cigarettes were "considerably more feasible." She then stated, "consumers wanted to buy [unfiltered cigarettes] and . . . nobody was telling us to stop making them." The cross-examination also established that over a period of time the market "dramatically switched" and that there was "a significant swing from non-filtered cigarettes to filtered cigarettes." The following Q and A then ensued:

> "[plaintiff]: That's proof that it [the filtered cigarette] was feasible, right?

> "dr. blackie: No, it's not. Because if you ask consumers to change tastes dramatically from one day to the next, what other countries experience has shown you end up with a black market for the products that they want. And, so they tend to go and buy overseas or they have cigarettes shipped in from another country . . . Whether that would have happened in this particular case . . . nobody can say . . . But, it's entirely possible."

Based upon the foregoing, it is evident that had tobacco litigation existed in the 1960s, manufacturer defendants would have argued that filtered cigarettes were not a feasible alternative because consumers "wanted" to buy nonfiltered. Today, not even the defendants in the instant case attempt to claim that a filtered regular Marlboro is not functionally interchangeable with a nonfiltered Camel.

What then should one effectively make of their argument that cigarettes manufactured with reduced carcinogen levels and lower nicotine yields are likewise not feasible alternatives because the overwhelming majority of smokers "want" regular cigarettes? Specifically, what should be made of such an argument when the further testimony of Dr. Blackie ("[y]ou train the consumer to accept new products") indicates that consumer tastes are nothing more than sensory experiences that can be influenced and molded by manufacturers?

I would therefore find "there is *no justification* for departrture from the accepted rationale imposing strict liability upon the manufacturer because it 'is in the superior position to discover any design

defects.' " (*See Scarangella*, 93 NY2d at 661, quoting *Voss*, 59 NY2d at 107 [emphasis added].)

If there is any argument at all to be made about ultra lights lacking the inherent usefulness of regular cigarettes or lacking the "ingredient critical to performance," then it must be made in context. The sole utility of regular cigarettes is to satisfy an addiction which, albeit an addiction to a legal substance, nevertheless increases exposure to cancer-causing tar.

However, that should not help the defendants in this negligent design defect action where the focus must move to the conduct of the manufacturer, and the question of whether the manufacturer acted unreasonably in designing the product. (*See Gonzalez v Morflo Indus., Inc.*, 931 F Supp 159, 165 [ED NY 1996] ["the focus shifts from whether the product, as designed, was not reasonably safe to whether the manufacturer was aware of that condition and chose to market the product anyway"].)

The record shows that the defendants possessed information about the reasons for smoking as far back as the 1950s. One exhibit, a 1959 report aimed at discovering why people smoke or do not smoke, showed that available data suggested the following physiological reasons why people smoked: gratification of senses such as oral and digital satisfaction, and stimulation or relaxation; and it suggested the following psychological reasons: conformity, sociability, sophistication, ritual, mimicry, and boredom.

The defendants conceded that their research established that nicotine was a "major pharmacological substance in tobacco smoke"; that nicotine satisfaction was the dominant desire of smokers;

and that .4 milligram was the tolerance level below which the addiction process does not start.

Further, evidence showed that Philip Morris had aimed its research at establishing that level of nicotine that was required to cause addiction. Testimony was also elicited as to the defendants' manipulation of nicotine levels after determining the level needed to keep smokers addicted. An expert for the plaintiffs, Dr. Wigand, testified that, "nicotine is the product that sells cigarettes *and unless you keep people addicted*, you cannot sell cigarettes." (Emphasis added.)

Thus, it is clear from the record that a cigarette could be manufactured to deliver more or less nicotine with greater or lesser attendant levels of cancer-causing tar depending on the purpose for which it was to be smoked. However, after the defendants discovered that .4 milligram was the threshold level to sustain addiction, they chose to manufacture not the lower level product, but one that delivered nicotine at addictive levels thereby creating for themselves a captive commercial market.

If, as defendants now assert, an ultra light does not serve the same function as a regular cigarette, it is because the defendants manipulated the product so that the function became almost exclusively to satisfy addiction, and it is clear that the defendants were not interested in those consumers who would smoke a cigarette "for other aspects" that would allow them to take or leave the smoking habit.

Proximate cause

The defendants further argue that the plaintiffs failed to prove that the failure to adopt the proffered

alternative design caused the plaintiff Norma Rose's injuries. The defendants assert that the plaintiffs were required to show that the design caused her cancer rather than the cigarettes themselves. The defendants further state that there was no proof that the difference in the tar and nicotine yields between the brands was a substantial contributing cause. The defendants point to the plaintiffs' own expert acknowledging that ultra lights are unsafe, and contend that evidence was adduced that smokers of ultra lights sometimes compensate by smoking more cigarettes.

It is true that proximate cause in a products liability case serves a different role than in a case sounding in negligence because the cause of action seeks to impute liability to the manufacturer not on the basis of its negligence but because the product is not reasonably safe as it was designed. (*Voss*, 59 NY2d at 110.) Thus, in order to impose liability on the manufacturer, the plaintiff's burden is to tie the design defect of the product to the injury—that is, the plaintiff must show that the design defect in the product was a substantial factor in causing his or her injury. (*Id.*)

In this case, however, I believe the defendants miss the point because the plaintiffs' theory is not that the safer design would have delivered less tar and nicotine, and thus less exposure to carcinogens. Rather, the plaintiffs' theory is that because the design was defective in maintaining the level of nicotine at an addictive level it caused Norma Rose *to continue smoking* and thus continued her exposure to cancer-causing carcinogens which, in fact, caused her cancer.

Additionally, the plaintiffs assert that the defendants should hahave ceased manufacturing and marketing the defectively designed cigarettes. Consequently, the plaintiffs did not have to establish that Norma Rose would have smoked the safer cigarette (there would have been no other kind). Nor were they obligated to present expert evidence to exclude the possibility that she could have maintained her addiction on ultra lights by smoking more given that the evidence indisputably established that Norma Rose wanted to quit smoking, and attempted to do so 15 times. Her testimony further established that when she tried to quit she exhibited all the characteristics of a severely addicted smoker including being "very nervous," "very nasty" and preoccupied with smoking. In my opinion, the evidence was sufficient to demonstrate that Norma Rose's undisputed genuine, recurring desire to quit would not have been thwarted by her addiction if her addiction was nonexistent or not sustainable on ultra lights. In turn, had she been able to quit when she desired, her exposure to cancer-causing tar would have been terminated.

"Proximate cause is a question of fact for the jury where varying inferences are possible." (*Mirand v City of New York*, 84 NY2d 44, 51 [1994], citing *O'Neill v City of Port Jervis*, 253 NY 423, 433 [1930]; *see Nowlin v City of New York*, 81 NY2d 81, 89 [1993]; *Mercado v Vega*, 77 NY2d 918, 920 [1991].) Given that causation is an inherently factual issue, "[a]s a general rule, the question of proximate cause is to be decided by the finder of fact, once negligence has been shown." (*Equitable Life Assur. Socy. of U.S. v Nico Constr. Co.*, 245 AD2d 194, 196 [1st Dept 1997]; *see Mortensen v Memorial Hosp.*,

105 AD2d 151, 157 [1st Dept 1984]; *McKinnon v Bell Sec.*, 268 AD2d 220, 221 [1st Dept 2000].) Further, a jury's causation finding should stand unless there is simply no valid line of reasoning and permissible inferences which could possibly lead rational people to the conclusion reached by the jury on the basis of evidence presented at trial. (*See Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978].)

In my view, the factual record here was more than sufficient to support a rational conclusion that the negligent design at issue—high-yield cigarettes containing .4 milligram or more of nicotine—was a substantial factor in causing Norma Rose's exposure to the tar in the cigarettes she smoked for more than four decades. This in turn caused her lung cancer and her brain injuries. It is undisputed that cigarette tar contains especially powerful carcinogens and the more cumulative exposure to tar, the greater the cancer risk. Conversely, less aggregate exposure to tar results in substantially lower cancer risk.

There is no dispute that the cigarettes the plaintiff smoked contained levels of nicotine well above the addictive threshold, and that that nicotine caused her to become severely addicted. Both the strength of her addiction and her motivation to stop smoking were demonstrated by her approximately 15 failed attempts to stop smoking in the late 1970s and early 1980s.

Thus, the record contains evidence from which rational inferences could be drawn that the unreasonably unsafe design at issue here—cigarettes with .4 milligram or more of nicotine—(1) resulted in the maintenance of Norma Rose's nicotine addiction, which (2) compelled her to continue smoking high-yield cigarettes despite her motivation and serious

attempts to quit, and/or to smoke more cigarettes than she otherwise would have in order to satisfy the addiction, and (3) thus significantly increased her exposure to the cigarette tar which, it is undisputed, caused her cancer. Conversely, the jury could rationally conclude that if the cigarettes Norma Rose smoked had contained less than .4 milligram of nicotine, her addiction would not have been sustained and either her efforts to quit smoking would have succeeded or she would have smoked far fewer cigarettes, thereby substantially lowering her cancer risk.

Federal preemption

The defendants claim, and the majority supports their view, that the trial court's finding of liability on the negligent design defect claim effectively bans the sale of all cigarettes currently on the market in New York State, and that such ban is preempted by federal law. (*See e.g. Geier v American Honda Motor Co.*, 529 US 861 [2000] [common-law tort action alleging that automobile manufacturer was negligent in failing to equip automobile with driver's side airbag was preempted in that it actually conflicted with National Traffic and Motor Vehicle Safety Act, requiring manufacturers to place driver's side airbags in some but not all 1987 automobiles].)

The defendants assert that Congress has foreclosed a cigarette ban (*see FDA v Brown & Williamson Tobacco Corp.*, 529 US 120 [2000]), instead regulating cigarette sales by imposing requirements for labeling and advertising. (*See* Federal Cigarette Labeling and Advertising Act of 1965, codified at 15 USC § 1331 *et seq.*) The defendants

claim that allowing the plaintiffs to recover damages based upon the dangers inherent in tobacco products would preclude the defendants from selling virtually all cigarettes currently on the market. (*See e.g. Conley v R.J. Reynolds Tobacco Co.*, 286 F Supp 2d 1097, 1107-1108 [ND Cal 2002] [claims were preempted to the extent that they relied on design defect so inherent in tobacco products that its removal was not scientifically or commercially feasible]; *Insolia v Philip Morris Inc.*, 128 F Supp 2d 1220, 1224 [WD Wis 2000] [Congress's considered decision that sale of cigarettes was not illegal and was part of market that government supported preempted state law negligence claim against tobacco manufacturers based on their continuing to manufacture and sell cigarettes once they realized danger that cigarettes posed, even though no statute or regulation explicitly preempted such claims].)

I find the defendants' contentions to be unpersuasive.

> "Under the Supremacy Clause of the United States Constitution (US Const, art VI, [2]), state law may be preempted in three circumstances: first, through express statutory language; second, when it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively; and third, when it actually conflicts with federal law." (*Feldman v CSX Transp., Inc.*, 31 AD3d 698, 701 [2d Dept 2006].)

The defendants do not point to express statutory language of preemption. Further, although there is federal regulation of labeling and advertising (15 USC § 1331 *et seq.*), there is no federal regulation of tar and nicotine content in cigarettes. (*Cf. Cipollone*

v Liggett Group, Inc., 505 US 504 [1992] [state failure to warn claims against cigarette manufacturers were preempted by Federal Cigarette Labeling and Advertising Act, as amended by the Public Health Cigarette Smoking Act of 1969].)

In my opinion, contrary to the defendants' contentions, Congress's omission in not wholly banning cigarettes or regulating tar and nicotine levels cannot serve to preempt state law tort claims premised on their danger to the public. Finally, there is no actual conflict with federal law, since there is no law on the subject matter serving as the basis of this lawsuit.

In *FDA v Brown & Williamson Tobacco Corp.* (529 US 120 [2000]) the Supreme Court held that the FDA lacked authority under the Federal Food, Drug & Cosmetic Act to regulate tobacco products as customarily marketed, primarily because FDA regulation would result in a cigarette ban given the FDA's mandate under the statute. The Court found that Congress, by regulating advertising and labeling under a separate legislative directive, had not intended the FDA to regulate this subject matter under the Federal Food, Drug & Cosmetic Act. Clearly, this case did not foreclose state tort claims on defective products.

Further, in my view, the damages award in this case is not synonymous with a ban on cigarettes. Instead, it holds the defendants liable for a failure to limit dangerous ingredients in their products, i.e., failure to sell a safer product. (*See Conley v R.J. Reynolds Tobacco Co.*, 286 F Supp 2d 1097, 1107-1108 [ND Cal 2002] [to the extent that claims targeted design defect in manufacturers' cigarettes which was scientifically and commercially feasible

to remove from products used by smoker before his death, state law design defect claims against cigarette manufacturers were not preempted, through conflict preemption, based on congressional policy precluding complete ban of tobacco products, inasmuch as successful claims would result in ban only as to those products which suffered from defective design, and thus involved only selective regulation of tobacco products].) Thus, I would find that negligent design cases like this one against cigarette manufacturers are not preempted by federal law.

Punitive damages

Finally, Philip Morris contends that its conduct in marketing different cigarette brands with a range of tar and nicotine yields cannot subject it to punishment in New York. Philip Morris argues that, as a matter of due process, an award of punitive damages cannot be based upon conduct that it could reasonably have believed to be lawful. On this issue, I agree with the defendant.

To warrant an award of punitive damages, there must be proof of recklessness, or a conscious disregard of the rights of others. (*See Hartford Acc. & Indem. Co. v Village of Hempstead*, 48 NY2d 218 [1979].) It is also well settled that punitive damages may not be premised upon mere negligence. (*See Everett v Loretto Adult Community, Inc.*, 32 AD3d 1273 [4th Dept 2006]; *Morton v Brookhaven Mem. Hosp.*, 32 AD3d 381 [2d Dept 2006] ["(p)unitive damages are recoverable where the conduct in question evidences a high degree of moral culpability, or the conduct is so flagrant as to transcend mere carelessness, or the conduct constitutes willful or wan-

ton negligence or recklessness" (internal quotation marks and citations omitted)].)

In this case, the record established that Philip Morris was aware that cigarettes caused cancer, and were addictive. It knew the threshold for a smoker's need, and could control the precise levels of nicotine in cigarettes. Further, Philip Morris continued to sell cigarettes with nicotine above the addictive threshold, and the plaintiffs presented documentation where Philip Morris set this as its goal. Thus, there was evidence to suggest that the defendant consciously disregarded the health risks posed to billions of consumers.

Nevertheless, Philip Morris's conduct in marketing different cigarette brands with a range of tar and nicotine yields cannot subject it to punishment under New York law. As a matter of due process, an award of punitive damages cannot be based upon conduct—such as that at issue here—that the defendant could reasonably have believed to be lawful. In *BMW of North America, Inc. v Gore* (517 US 559, 574 [1996]), the Supreme Court explained that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of the conduct that will subject him to punishment." (*See also Bouie v City of Columbia*, 378 US 347, 355 [1964] [when punishment is imposed based on novel construction of statute, "the effect is to deprive (defendant) of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime"].)

Philip Morris did not have "fair notice" that the conduct at issue in this case might result in severe punishment. Indeed, the verdict in this case is novel. Congress not only has made a purposeful choice to

regulate sales and advertising rather than to bar the sales of regular cigarettes, but has also blocked attempts to regulate tar and nicotine levels. The Surgeon General has never recommended removing regular-yield cigarettes from the market. No state or federal legislator or regulator has ever adopted a rule banning or restricting full-flavored cigarettes. And until this case, no court had ever held any tobacco manufacturer liable simply for continuing to sell regular brands, much less suggested that such conduct was punishable. In my view, punitive damages may not be imposed under such circumstances.

Tom, J.P., and Malone, J., concur with Friedman, J. Nardelli and Catterson, JJ., dissent in a separate opinion by Catterson, J.

Judgment, Supreme Court, New York County, entered July 18, 2005, reversed, on the law, without costs, defendants-appellants' motions for a directed verdict and for judgment notwithstanding the verdict granted, and the second amended verified complaint dismissed. The Clerk is directed to enter judgment accordingly.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - IAS PART 44

Index No. 101996/2002

NORMA ROSE and LEONARD ROSE,

Plaintiffs,

—against—

BROWN & WILLIAMSON TOBACCO CORPORATION, as successor in interest to AMERICAN TOBACCO, PHILIP MORRIS, USA, INC, and R. J. REYNOLDS TOBACCO COMPANY,

Defendants.

DECISION AND ORDER

HON. KAREN S. SMITH

From February 7, 2005 through March 28, 2005, this court tried the sole remaining cause of action (negligent product design) in the instant case before a jury in three phases. The first phase of the trial was to determine liability for damages suffered by the plaintiffs as a result of plaintiff Norma Rose having smoked cigarettes manufactured by defendants over a 46 year period. The second phase of the trial was to determine if there was sufficient evidence to impose punitive damages on the defendants who

were found liable in phase one of the trial. The third phase of the trial was to determine what amount, if any, should be imposed as punitive damages on the defendant who was found liable in phase two of the trial.

On March 18, 2005, the, jury rendered a verdict on compensatory damages in favor defendant R.J. Reynolds Tobacco Company against plaintiffs, and in favor of plaintiffs against defendant Brown & Williamson, as successor in interest to American Tobacco (hereinafter "American Tobacco"), and in favor of plaintiffs against defendant Philip Morris, USA, Inc. (hereinafter Philip Morris). The jury apportioned liability equally (50% each) against defendants American Tobacco and Philip Morris for the following compensatory damages; (1) two million dollars ($2,000,000) for Mrs. Rose for past pain and suffering, (2) one million dollars ($1,000,000) for Mrs. Rose for future pain and suffering, (3) three hundred thousand ($300,000) for Mr. Rose for past loss of consortium, and (4) one hundred twenty thousand dollars ($120,000) for Mr. Rose for future loss of consortium.

On March 24, 2005 the jury rendered a verdict on liability for punitive damages in favor of defendant American Tobacco against plaintiffs, and in favor of plaintiffs against defendant Philip Morris.

On March 28, 2005, the jury rendered a verdict on punitive damages in favor of plaintiffs against defendant Philip Morris in the amount of seventeen million one hundred thousand dollars ($17,100,000).

Defendants American Tobacco and Philip Morris now move for a directed verdict pursuant to CPLR

§ 4401[1], and for judgment notwithstanding the verdict, or, in the alternative, for a new trial on liability for compensatory damages pursuant to CPLR § 4404(a). Philip Morris also moves for judgment notwithstanding the verdict or a new trial on punitive damages pursuant to CPLR § 4404(a). Oral argument was held on October 7, 2005. For the reasons stated below, the court denies all these motions in their entirety.

The court finds that the plaintiffs made a *prima facie* showing of liability for negligent product design by the close of their case having submitted sufficient facts demonstrating that (1) at the time they manufactured the cigarettes that Mrs Rose smoked, defendants knew that tar in cigarettes causes lung cancer and nicotine causes addiction (a fact defendants admitted at trial), (2) at that time they manufactured their products defendants had the knowledge and the technological feasibility to manufacture a safer product, (3) defendants chose instead to continue manufacturing the defectively designed product, and (4) the defectively designed product was a substantial factor in causing Mrs. Rose's injuries. Thus, as plaintiffs made a *prima facie* showing of all of the essential elements of their case, defense motions for a directed verdict are denied.

As for American Tobacco's and Philip Morris's motion on liability and compensatory damages seeking a judgment notwithstanding the verdict or, in the

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[1] All defendants moved for a directed verdict at the close of plaintiffs' case. The court reserved on the motion and gave permission to the defendants to include full argument on their motion for a directed verdict in their post verdict motion papers.

alternative, a new trial, and Philip Morris's motion on the jury's award on punitive damages seeking the same relief, the court finds that the moving defendants have failed to sustain their burden of proving either that there is no valid line of reasoning or permissible inferences which could possibly lead rational persons to the conclusion reached by the jury, or that there is no fair interpretation of the credible evidence that will support the jury's verdict. Nor does the court find that its rulings during either the compensatory or the two punitive damage phases of the trial deprived the moving defendants of a fair trial.

The following are the specific grounds cited by the moving defendants as a basis for their motion in relation to the compensatory damage phase of the trial: (1) plaintiffs' negligent product design claim is preempted by the doctrine of conflict preemption, (i.e. Congress's regulation of cigarette smoking so dominates the field that any laws or regulations which appear to conflict with Congress's intent, are preempted), (2) plaintiffs failed to prove that the products were defectively designed, (3) plaintiffs failed to establish, and the court erred in its charges and evidentiary rulings with respect to, the requisite elements of proximate cause (i.e. Mrs. Rose failed to prove, and the court erroneously ruled that plaintiffs were not required to prove, that Mrs. Rose would have used the low tar/low nicotine cigarettes and would thereby have avoided her injuries), (4) the court erred in excluding evidence of consumer acceptability and by failing to instruct the jury that a safer alternative design must be commercially viable, (5) the court erred in failing to admit evidence and charge the jury as to consumer awareness

and expectations, (6) the court erroneously excluded evidence and failed to charge the jury regarding informed choice, (7) the court failed to properly instruct the jury that they must consider the utility of cigarettes, (8) the court erred by not instructing the jury on industry custom and practice, (9) the court erroneously admitted incompetent and irrelevant testimony by plaintiffs' experts, Drs. Wigand and Grunberg, and (10) the court erred in dismissing the defenses of express and primary assumption of risk.

The specific grounds cited by Philip Morris as a basis for its motion on the punitive damages phases of the trial are that: (1) the claim for punitive damages in a negligent product design case, involving the manufacture and sale of cigarettes, is barred by the doctrine of conflict preemption, (2) defendant Philip Morris is entitled to a new trial based on specific enumerated errors made by the court during the punitive damage phases of the trial, including, but not limited to, alleged prejudicial comments made by the court to defendant Philip Morris's attorney and the court's substitution of an alternate juror in the damages phase of the trial, and (3) the jury's ward of $17,100,000 in punitive damages is grossly and unconstitutionally excessive.

The vast majority of defendants' arguments in their post trial motions reargue the same arguments they made at trial. The court finds no valid line of reasoning to change its in *limine* decisions post trial and stands on the record as to those matters. The court thus incorporates and refers the parties to its September 29, 2005 decision *(Rose v. Brown & Williamson Tobacco Corp., et al*, NYLJ, October 26, 2005 at 22, col 3; 2005 NY Slip Op 25459, 2005 NY

Misc LEXIS 2392) for the decisions on the following issues: (1) whether the cause of action for negligent product design is barred by conflict preemption, (2) whether evidence of the public's awareness or common knowledge of the dangers of cigarette smoking is properly excluded in a case in which liability is premised on the manufacturer's conduct, (3) whether the affirmative defenses of primary and express assumption of risk are properly excluded, (4) whether it is proper to exclude evidence of commercial viability as an element in the determination of whether the safer alternative design is feasible, (5) whether the burden of proof for punitive damages in a negligent design case is based on a "preponderance of the evidence" standard, and (6) whether evidence of Philip Morris's profits and financial status must be excluded in the punitive damages phase of the trial.

The following are the remaining issues raised in these motions, which require decisions: (1) whether the court's refusal to allow post 1993 scientific evidence on the safety, or lack of safety, of low tar/low nicotine cigarettes so prejudiced the defendants that a new trial is required, (2) whether this court's comments to defendant Philip Morris's counsel during phase two of the trial were so prejudicial as to require a new trial, (3) whether the substitution of one of the alternate jurors in phase two of the trial so deprived the defendants of a fair trial, that a new trial is necessary and (4) whether the $17,100,000 punitive damage award was grossly and unconstitutionally excessive.

The Exclusion of the Post 1993 Scientific Evidence That Low Yield Cigarettes Were Not A Safe Alternative

Defendants claim that the court erroneously precluded the introduction of evidence that post 1993, (after Mrs. Rose ceased smoking), the scientific community, including the United States Surgeon General, voiced doubts that low tar/low nicotine ("low yield") cigarettes were a "safe" alternative to high tar/high nicotine ("high yield") cigarettes (page 22, lines 5-11 of the October 7, 2005 transcript of the oral argument on these motions). According to defendants, had such evidence been admitted for the jury to consider, the jury could have concluded that low yield cigarettes were not a "safe" alternative and as such defendants could not be liable for negligently designing their products. In addition, defendants maintain, absent a showing that there was a "safe" alternative design, there can be no showing that defendants' products were a substantial factor in causing Ms. Rose's injuries.

Contrary to defendants' assertions, to sustain a cause of action for negligent product design the plaintiff must prove only that there is a "safer" alternative design, not a "safe" alternative design (*Voss v. Black & Decker*, 59 NY2d 102 [1983]). In addition, defendants' argument ignores the fact that, under New York law, evidence of the "state of the art"[2] which was not known until after the date of the manufacture of the alleged defective product, is

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[2] "State of the art" evidence has been defined as "the safety, technical, mechanical and scientific knowledge in existence and reasonably feasible for use at the time of manufacture." (*Bolm v. Triumph Corp.*, 71 AD2d at 438.)

inadmissible in determining whether the manufacturer of the product was negligent (see, *Bolm v. Triumph Corp.*, 71 AD2d 429, 436-438 [4th Dept 1979]; *Frank v. Volkswagenwerk*, 105 Misc. 2d 760 [Sup Ct NY County 1980].) While such evidence has been held to be admissible "with appropriate limiting instructions, if the defendant contests the issue of feasibility" of the alleged safer alternative design, it is plaintiff who is permitted to introduce evidence that the defendant made changes in the product after the accident, which made it safer, and that the changes were available to the defendant manufacturer before the accident in question *(Bolm v. Triumph Corp, id* at 437; *Frank v. Volkswagenwerk, id* at 762). Such evidence is only admissible, however, for the limited purpose of showing the "feasibility" of the alternative design, not to show that the alternative design is safer, i.e. that it reduces the risk of injury. In this case defendants are seeking to offer post manufacture state-of-the-art evidence to challenge plaintiffs' claims as to the safety of the low yield cigarettes to demonstrate that defendants cannot be held liable for negligent design. As stated above, the law does not permit the introduction of such evidence for the purposes of proving liability under a theory of negligence.

While such evidence, may be admissible on the issue of proximate cause, the trial transcript shows that this evidence was admitted at trial through the testimony of defendants' expert, Dr. Sharon Blackie (Tr, p.3068, line 6 - p. 3071, line 21, p. 3158, lines 22-25, p. 3159, lines 1-12, p. 3245, line 23-24, p. 3246-3248, p. 3250-3253). According to Dr. Blackie, commencing in 1981 and culminating in the 1989 Surgeon General's Report, the scientific community

began to express doubts that low yield cigarettes were safer than the high yield cigarettes, finding that smokers who smoked low yield cigarettes over-compensated for the loss of taste (caused by the decrease in tar) and the loss of the buzz (caused by the decrease in the nicotine) by holding the smoke in longer or by smoking more cigarettes.[3] Defendants' expert Dr. Richard Carchman also testified concerning research by scientists which suggested that low yield cigarettes were not safe (Tr. p. 2388, lines 1-26, p. 2389, lines 1-5, p. 2392, lines 2-11, p. 2393, lines 1-10). While the substance of his testimony was no different than Dr. Blackie's on this point, the court struck his testimony (Tr. p. 2390, lines 14-21) because he referred to studies which were done post 1993, after the acts complained of in the lawsuit.

As Dr. Carchman's testimony would have been cumulative on this point, the court finds that defendants were not prejudiced by the court's ruling striking such testimony.

Court's Comments to Philip Morris's Attorney

According to Philip Morris, this court's comments during the punitive damages phase of the trial that, in essence, their attorney would probably be appealing the case and, in the appeal, would attack the rulings of the court, as had been his practice throughout the trial, was so prejudicial as to require a new trial. The court notes that it immediately gave a curative instruction to the jury to disregard the comments.

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[3] According to plaintiffs' expert witness, Dr. Jeffrey Wigand, it was not until 2002 with the release of The National Cancer Institute's Monograph # 13, that some scientists began to opine about the health risks of low yield cigarettes. (Tr. page 1019, line 22 - page 1021, line 24).

The court also notes that it is common sense that in a case such as this, where the stakes are high, the losing party will probably appeal. The comments by the court about Philip Morris's attorney, while regrettable, were no more than a recognition of his behavior towards the court throughout the trial, as born out by the trial transcript, which was apparent to the jury.

The court regrets the comments and leaves it to the appellate court to determine, based on the full record of the eight week trial, whether this one comment, with the corrective instruction provided to the jury, constitutes reversible error.

The Substitution of One of the Alternate Jurors in Phase Two of the Trial

In phase two of the eight week trial, one of the jurors who had been part of the deliberations in phase one, had to leave the jury at the conclusion of phase one, as she was moving out of town and her employer required her to work a certain amount of time in order to continue to receive her medical benefits. The alternate jurors sat throughout the trial and were included during all of the read backs and responses to the jury's questions.

The court finds unavailing Philip Morris's argument that a substitution under such circumstances, where new evidence is being offered as to liability for punitive damages in a separate phase of the trial, was so prejudicial to defendants as to require the setting aside of the punitive damages portion of the verdict and to hold a new trial on those issues. The constraints of CPLR § 4106, which permits the court to substitute an alternate juror without consent of the parties only before the final submission of the

case to the jury, does not apply here. That constraint only applies to a trial where issues of liability and damages are tried together in one phase.

The only case which was provided to the court directly on point, is the case *U.S. v. Webster* (162 F2d 308 [5th Cir 1998]) in which the court held, in a situation similar to the instant case, that a criminal defendant suffered no prejudice when the trial court excused a sitting juror after the first phase of a trial and elevated an alternate juror before the jury retired for its deliberations at the penalty phase of a bifurcated trial. The court reasoned that there was no prejudice to the defendant since the alternate juror had sat through both phases of the trial.

The court thus denies that portion of defendants Philip Morris's motion seeking to set aside the verdict for substitution of an alternate juror in the damages phase of the trial.

The $17,100,000 Punitive Damages Verdict

Philip Morris argues that the court must set aside the $17,100,000 punitive damage award as it is grossly and unconstitutionally excessive. Philip Morris maintains that as it was found to be only 50% liable for the $3,420,000 compensatory damage awarded to plaintiffs, (or $1,710,000), the $17,100,000 punitive damage award, which is ten times greater than Philip Morris's portion of the compensatory damages, is grossly excessive and arbitrary, and thus violates defendant's due process rights under the United States Constitution.

Contrary to Philip Morris's argument, the United States Supreme Court did not set up, either in *State Farm Mutual Automobile Insurance Co. v. Campbell*, (538 US 408 [2003]) or in *BMW of North Amer-*

ica, Inc. v. Gore (517 US 559 [1996]), a "bright line" single digit ratio between compensatory damages and punitive damages which cannot, under any circumstances, be exceeded. (*BMW, id* at 582; *Planned Parenthood v. American Coalition of Life Activists, et al.*, 422 F3d 949, 954 [9th Cir 2005].) In *State Farm*, the Supreme Court (citing its decision in *BMW* articulated three guideposts courts should consider to determine whether an award violates due process:

> (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.[4]

(*State Farm, id* at 418, citing *BMW*, 517 US at 575.)

Defendant relies solely on the language in *State Farm* where the Court states that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process" (*Id.* at 425) and the language that "a 4 to 1 ratio, based on a long history of sanctions, might be close to the constitutional line", to support their argument that the 10 to 1 ratio awarded by the jury in the instant case, is constitutionally excessive. The Supreme Court has never held that an award of punitive damages which exceeds a single digit ratio is *per se* unconstitutional. Defendant's argument places too much weight on the second guidepost which merely considers the pure mathematic ratio between the compensatory

[4] Philip Morris did not refer to the third guidepost either in their papers or in oral argument.

and the punitive damage awards to determine if the punitive damages award passes constitutional muster. In fact, of the three guideposts, the Supreme Court has emphasized that "perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct" (*BMW, id*). The degree of reprehensibility not only determines if punitive damages should be awarded ("punitive damages should only be awarded if the defendant's culpability . . . is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence" [*State Farm, id* at 4191]), but is the key determining factor in considering whether the ratio, referred to in the second guidepost, is excessive.

In evaluating the reprehensibility of the conduct, there are certain factors the courts weigh. The courts place greater weight on physical injury and an indifference to safety and health than on economic injury. Trickery or deceit is afforded greater weight than mere accident or negligence. The courts also consider whether deliberate false statements or acts of affirmative misconduct are involved (*State Farm, id* at 419; *Planned Parenthood v. American Coalition of Life Activists, et al.*, 422 F3d at 954).

In the instant case, sufficient evidence was submitted at trial for the jury to conclude that Philip Morris's continued manufacture and sale of the defectively designed product (high yield cigarettes) at a time they were capable of manufacturing a product which reduced the risk of injury (low yield cigarettes), demonstrated a reckless disregard for safety and health. This conclusion was further supported by evidence presented at trial, albeit contested by defendants' witnesses, that defendants

(including Philip Morris), added chemicals to cigarettes to speed up the delivery of nicotine to the brain which increased the deleterious impact of the nicotine on the brain, and that defendants (including Philip Morris), hid this from the public. In addition, documents were submitted at the trial, many of which were authored by defendant Philip Morris's executive officers, which tended to show that defendant's executives were fully aware of the dangers of addiction and of lung cancer but attempted to obfuscate and conceal the dangers from the public. Although the claims at trial did not involve any claims for failure to warn or misrepresentation, evidence of the behavior was admissible in the punitive damages phase of the trial for the purposes of determining whether each defendant's conduct was reprehensible and thus what amount of punitive damages should be awarded.

Based on all of the evidence in the case, the jury imposed punitive damages against defendant Philip Morris in an amount which represents a 10 to 1 ratio of punitive damages in relation to defendant Philip Morris's proportional share of the compensatory damages awarded by the jury.[5] In *Planned Parent-*

[5] Contrary to both defendants' and plaintiffs' assertions, the court does not find the *Planned Parenthood* case to be applicable to the instant case on the issue as to whether the court should consider the entire compensatory award as against defendant Philip Morris in setting the appropriate ratio or only defendant Philip Morris's proportionate share of the compensatory damages. In *Planned Parenthood*, there were multiple defendants held liable for the punitive damages. In the instant case, only defendant Philip Morris was held liable for punitive damages. In addition, the court reads *Planned Parenthood* as holding that the court should first set the constitutionally permissible ratio based on the factors cited above, and then cal-

hood v. American Coalition of Life Activists, et al., (*id.*), the 9th Circuit Court of Appeals found that a 9 to 1 ratio did not offend constitutional sensibilities where there were sufficient facts to show that the plaintiff doctors, who performed abortions, had cause to fear physical harm or worse, from the indirect physical threats made by defendants (*Id* at 963). In the *Planned Parenthood* case, however, the plaintiffs did not suffer any physical harm as a result of the defendants' conduct. In the instant case, the defendant's conduct did result in physical harm to the plaintiff Norma Rose. Moreover, unlike the defendants in *Planned Parenthood*, the evidence presented at trial showed that defendant Philip Morris's conduct was motivated solely by pecuniary gain.

Based on the evidence presented at trial, the court finds that a ratio of 10 to 1, is not excessive and thus does not violate Philip Morris's rights under the Due Process Clause of the United States Constitution. The court thus denies the portion of Philip Morris's motion to set aside the punitive damages award.

For the reasons stated above and in the court's September 29, 2005 decision on defendants' motion in *limine*, defendants' motions are denied in their entirety.

This constitutes the decision and order of the court.

Dated: December 2, 2005
New York, New York

/s/ KAREN S. SMITH
Karen S. Smith, J.S.C.

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culate each defendants liability based on their proportionate share of the punitive damages, as assigned to them by the jury.